John Quincy Adams

ADAMS 283.9 v.1

John Adams.

Trials per Pais:

OR, THE

LAW of *ENGLAND*

CONCERNING

Juries by *Niſi Prius*, &c.

With a Compleat TREATISE of

The Law of EVIDENCE,

Collected from all the Books of Reports; together with Precedents, and Forms of Challenges, Demurrers upon Evidence, Bills of Exception, Pleas *Puis le Darrein Continuance*, &c.

The Eighth Edition, with large Additions.

CONTINUED

Down to this preſent Year; together with ſuch ſubſequent Reſolutions, as have been given in the Courts of *Weſtminſter-Hall*: The Whole put into a Method moſt uſeful and eaſy to the Practiſer.

With a full and copious Table to the whole.

Very Uſeful and Neceſſary for all Lawyers, Attornies, and other Practiſers, eſpecially at the ASSIZES.

Originally compiled by GILES DUNCOMB, heretofore of the *Inner-Temple*, Eſq; and continued by a Careful Hand.

In TWO VOLUMES.

VOL. I.

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ADAMS 283.9 v.1

I Do allow the Printing and Publiſhing of this BOOK, Entituled, *Trials per Pais:* Or, *The Law of* England *concerning Juries by* Niſi prius.

Fr. Pemberton.

TO THE

PRACTISERS

OF THE LAW.

Gentlemen,

IN the Dedication of Books, ſuch Perſons ſhould be choſen whoſe Studies and Profeſſion agree with the Nature of the Subject. To prove *Concluſions* in one *Science* by the *Heterogene Principles* of another; to make a *Grammarian* Patron to a Piece of the *Mathematicks*; to dedicate a Treatiſe of *Logick* to a Maſter of *Muſick*; or a Matter of *Practice* to a Man of *Speculation*; would not only be im-

proper, but abſurd. You know that in the whole Practice of the Law, there is nothing of greater Excellency, nor of more frequent Uſe, than Trials by *Juries*. In this, our Common Law (and not without juſt Cauſe) values itſelf beyond the *Imperial Law*, before the *Canon Law*, or any other *Laws* in the World. And ſeeing the Hopes and Life of all the Proceſs, the Force of the Judgment and the Truth, nay, the Right of the Parties lie in the Trial; for as one elegantly ſays, *Qui non probat*, at the Trial, *dicitur veritate & jure carere*; and indeed the Knowledge of all the *Law* tends to this: For without Victory at the Trial, to what Purpoſe is the Science of the *Law?* The Judge can give no Sentence, no Deciſion without it, and muſt give Judgment for that Side the Trial goes; therefore I may well ſay, 'tis the chief Part of

the Practice of the *Law*. And if ſo, to whom ſhall I offer this Treatiſe, but to you the Practiſers?

I need ſay nothing for ſmall Tracts and Treatiſes; the infinite Number of them in the *Civil Law* (there being for every Title a diſtinct Tract) nay the Number of them in our *Law*, ſufficiently ſhew their Uſe.

Joachimus Forbus Ringelbergius, in his Book *de Ratione Studii*, giving Directions what Books Students ought to carry with them when they change Places, and travel from one to another, tells us that out of the Volumes (by Reaſon of their Bigneſs not portable) he uſed to tear ſeveral Leaves, and take them with him in his Journeys; and ſo he ſaid he had ſerved the Works of *Pliny*, *Tully*, *Plato*, *Demoſthenes*, *&c.* altho'

he had given great Prices for them; which juſtifies the Writing of this Treatiſe, the ſubject Matter thereof being of ſuch general Uſe in all Circuits.

When I read the elaborate Books of *Farinacius de Teſtibus*, and the three exquiſite and incomparable Volumes of *Maſcardus de Probationibus*, in the *Cæſarian* and *Pontifical Laws*, (which Works were ſo valued and eſteemed that they were looked upon as new Lights ſent from Heaven, by the Profeſſors of thoſe *Laws*) I could not but ſee the Defect and Want of ſuch Books in our Law: For ſurely they are as neceſſary in the one as in the other. And although I cannot compare my weak Endeavours with thoſe Excellent and Methodical Works, theirs being intire, this only *quaſi* an Abridgment, fitted for Uſe, not for Show: Yet until more learned and judicious

judicious Proficients in our Law ſhall undertake the Work, I thought fit to produce mine.

To compare this Sort of Trial by *Jury* with the Trials of other Laws and Countries, and declare how much and wherein it excels them all, after *Forteſcue de laudibus*, &c. and his learned *Commentator*, would be like the Arrogance of Limning after *Appelles*, and requires the Room of a Volume, rather than an Epiſtle. And conſidering my own Inſufficiencies, I ſhall praiſe it more by ſaying nothing, than all I can: For to ſay leſs than a Thing deſerves, would be, inſtead of an Encomium, a Diſparagement. Therefore I ſhall content myſelf, only to ſay, That Trials in other Laws are by Witneſſes only, privately examined; this, by Witneſſes publickly examined and confronted; and by *Jury* alſo, and ſo conſequently the

Fact is ſettled with the greater Certainty of Truth, upon which the Uprightneſs of the Judgment depends.

It would be well if there were leſs Corruption in the returning of *Juries*; but I think 'tis paralell'd, if not exceeded, by that of examining Witneſſes privately, on whoſe Depoſitions the Trials in other Laws conſiſt: And ſo there muſt be no Objection againſt the Thing. I hope an Expedient may be found out to prevent the Corruption in returning *Juries*, but I believe it never can in the other.

To ſay this Trial by *Jury* is too popular in a Monarchy, would be a good Objection from a *Frenchman*, but not of any *Engliſhman*, who lives under the beſt tempered Monarchy, and the beſt Sort of Government in the World, to which this

this Manner of Trial is ſo proper and accommodated, that neither the Wiſdom of our Anceſtors could, nor (I may ſay) can this preſent, nor After-Ages invent a better.

But as the unſkilful *Painter* drew a Curtain before what he could not expreſs with his Pencil, ſo muſt I veil with Silence the Excellencies of this celebrated *Trial*, which I am not able to delineate.

Gentlemen,

To make an Apology for the Stile of a Law-Book, eſpecially of an Epitome, would be a vain Thing; *Ornari res ipſa negat, contenta doceri*; neither ſhall I make any Apology for my undertaking this Work: If 'twas better performed, yet *Momus* would be carping; and if it was worſe, it would

would be good enough for him, who cannot, or will not do it better: Be it what it will, your kind Reception will abundantly satisfy

Your Servant,

G. Duncombe.

THE

PREFACE

TO THE

FIRST EDITION.

THE Philoſopher could not ſee a Man unleſs he heard him ſpeak; *Loquere ut videam.* Speech is the Index of the Mind, and the Mind only diſcriminates the Man. For although an *Ideot*, who hath but the Shape of a Man, may with Silence ſo hide his Folly, that Strangers to his Manners cannot diſcern him from a Sophiſter: Yet, doubtleſs, Silence is the greateſt Enemy to Learning, the Grave wherein Oblivion buries the Parts and Knowledge of the braveſt Spirits.

Where-

Hiſtor. facil. Princeps.

Wherefore learned *Saluſt*, from this takes his *Exordium*; *Omnes homines qui ſeſe ſtudent præſtare cæteris animalibus, ſumma ope niti decet, ne vitam ſilentio tranſeant, veluti pecora:* Thoſe Men who would excel Beaſts, ſhould labour that their Lives might not paſs in ſuch Silence as Beaſts do. It ſeems he deemed that Man little ſuperior to a Beaſt, who acted nothing to prolong his Memory: For this he held to be the Duty of every Man, ſaying, *Quo mihi rectius eſſe videtur, ingenii quam virium opibus gloriam quærere; & quoniam vita ipſa, qua fruimur, brevis eſt, memoriam noſtri quam maxime longam efficere:* In my Opinion, it is far better to acquire Glory by the Riches of Wit, than Strength; and becauſe our Lives are ſhort of themſelves, we ſhould endeavour by Ingenuity to eternize their Memory.

Nulla dies ſine linea.

And to effect this *Nulla dies abeat, quin linea ducta ſuperſit:* No Day ſhould paſs over our Heads, wherein we ſhould not act ſome memorable exploit: Men ſhould not live like *Snails*, never ſtirring out of their Houſes; but be active (I mean not Buſy-Bodies in other Mens Matters, but) in their own Callings, of which the wiſe *Cato* tells us, *Every Man ſhould give a reaſonable Account:* And if we believe the famous

mous *Seneca*, *Nihil eſt turpius quam grandis natu ſenex, qui nullum habet vitæ ſuæ argumentum, quo diu ſe vixiſſe dicat præter ætatem:* Nothing is more unworthy than an old Man, who has nothing to ſhew for his Antiquity but a grey Beard; whoſe Soul ſerved only as Salt to keep his Body ſweet; and is no ſooner Dead, than forgotten, long before he is half rotten: Yet who is ſo apt to deride the Endeavours of other Men, as this ancient *Ignoramus*, whoſe Wrinkles in his Face, worn-out Looks, and many Years, ſway more with the vulgar People, than all the Arguments of Law or Reaſon? Had *Seneca* been ſuch a ſilent *Momus*, the World would never have been bleſt with his ſo learned Works. And doubtleſs Writing Books is needful in no Science more than in the Law. For without Books, how would the Lawyers do for Arguments at the Bar, or Reſolutions at their Chambers; whence the Oracle, Sir *Edward Coke*, pronounces this, *Omnes debere Juriſprudentiæ libris componendis animum adjicere:* That all Men ought to addict themſelves to the compoſing Books of Law; ſome to the Reporting of the Judgments and Reſolutions of the Judges, who are *Lex Loquens*; and ſome to the collecting of thoſe Caſes and Reſolutions, methodizing and fitting them for ſome particular Purpoſe, as *Littleton*, *Staundford*,

Staundford, *Fitzherbert*, *Crompton*, *Perkins*, *Finch*, *&c.* And indeed, moſt of the Law Books extant, if not all, (ſetting aſide the Reports) are nothing elſe but Collections out of others. This I ſpeak, not in Derogation of them in the leaſt; for as 'tis equally, if not more laborious, ſo 'tis full as glorious, judiciouſly to cull authentick Caſes out of the Volumes of the Law, (where ſo many are no Law) and rightfully place them in a particular Treatiſe, as 'tis to report the Judgments and Reſolutions from the Mouth of the Court; for the Reporter is but the Court's Secretary, and *Coke's Inſtitutes* merit as much as his Reports; and *Aſh*'s Tables, *Fitzherbert* and *Brook*'s Abridgments are as uſeful as the Year-Books themſelves, of which Kind of Collections, one elegantly thus breaks out, *Quo quidem beneficio, haud ſcio, an aliud aut legum Candidatis magis gratum, aut Reipublicæ magis commodum, aut divini honoris illuſtrationi magis idoneum, vel cogitando quidem conſequi quiſquam poterit.* Than which Benefit I know not whether any Man can ever imagine another, either to Lawyers more grateful, or to the Commonwealth more profitable, or for the Illuſtration of Divine Honour more fit. For with the leaſt Labour, a ſmall Price, and little Time, they preſent you with thoſe Reſolutions and Judgments which

which lie ſcatter'd in the voluminous Books of the Law; which would otherwiſe coſt much Time, Pains and Charges to find out. The Thoughts of which Publick Good firſt gave Life to theſe Endeavours of mine: Not that any one ſhould in the leaſt imagine, that I am ſo guilty of vain Oſtentation, as to believe that my Parts or Abilities can perform any Thing in this Kind like other Men: No, *Ipſe mihi nunquam Judice me placui.* I could never yet pleaſe myſelf with my own Labours, much leſs are they worthy to pleaſe others; *haud equidem tali me dignor Honore.* However, when I conſider, that no Man hath yet written particularly concerning this Subject, and of what general Uſe it is; I doubt not but that this Treatiſe will receive a favourable Conſtruction from moſt Men, and a plauſible Acceptation from others.

The Uſe of it is in a Manner Epidemical; ſince moſt Mens Lives and Eſtates are ſubject to that Trial *per Pais* here demonſtrated; but in particular the Practiſers at Law (eſpecially *Circuit-Advocates*, *Attornies*, *Solicitors*, *Clerks*, &c.) and all *Jurors* (for whoſe Direction it is of ſingular Uſe) are chiefly concerned herein. But I will not hang a Buſh out, to invite and prepoſſeſs your Judgments, *Vincat Utilitas.* The Profit which every ingenious Reader ſhall

The Uſe of the Book.

ſhall gather out of it, will ſpeak more for it than the beſt Eulogical Preface.

And for my own Part, I profeſs my ſelf to be *Philomathes*, but not *Polymathes*. And notwithſtanding the hard-favoured Objections which ſome Men caſt upon it, I really think the Study of the Law to be the moſt pleaſant Study in the World. And he which delighteth in the Study of any other Art or Science, muſt conſequently be delighted with this. For the Knowledge of the Law, as *Doderidge* ſaith, is moſt truly ſtiled, *Rerum Divinarum humanarumque ſcientia*, and worthily imputed to be the *Science of Sciences*, for therein lies hid the Knowledge of every other Learned Science.

So that he which gives himſelf to the Study of Divinity, may here fill himſelf with holy and pious Principles of Divine Laws: For, *Lex eſt ſanctio ſancta, jubens honeſta, & prohibens contraria; ſanctum etenim oportet eſſe quod ſanctum definitum:* The Law is a holy Sanction or Decree, commanding Things that be honeſt, and forbidding the Contraries: Now the Thing muſt needs be holy, which by Definition is determined to be holy. So that in this Reſpect, ſaith *Forteſcue*, Men may well call Lawyers *Sacerdotes*, that is, Givers or

or Teachers of Holy Things. For the Laws being Holy, it follows that the Miniſters and Setters forth of them muſt be Givers of Holy Things; and ſo by Interpretation doth *Sacerdos* ſignify; and doubtleſs, he which duly conſiders thoſe Rules of *Theology*, which lie ſcattered throughout the whole Body of the Law, muſt needs conclude our Laws to be Commentaries upon the Old and New Teſtament; and do ſo much bear the Image *Legis Divinæ*, that they may well be attributed to the Moſt High.

The Rules of *Grammar*, *Philoſophy Natural*, *Political*, *Oeconomick* and *Moral*; as alſo the Grounds of *Logic*, and of other Arts and Sciences, ſo much abound in our Books, that the very Reading of the Law will make a Man *Maſter* of thoſe Sciences.

And ſince *Rhetorick* is *Ars ornate dicendi*, and conſiſteth of thoſe two Parts *Elocution* and *Pronunciation*, How can we read in our Law Books thoſe learned Arguments, elegant Speeches and Judgments, pronounced with ſuch Eloquence and Elegance of Words and Matter, and not conclude, That Rhetorick is the Glory and Grace of a Lawyer? Though ſome (not gifted that Way) would perſwade us that the Law hath little Relation to it.

If any Man be delighted in hiſtory, let him read the Books of Law, which are nothing elſe but Annals and Chronicles of Things done and acted from Year to Year, in which every Caſe preſents you with a *petit* Hiſtory; and if Variety of Matter doth moſt delight the Reader, doubtleſs, the reading of thoſe Caſes, (which differ like Men's Faces) tho' like the Stars in Number, is the moſt pleaſant Reading in the World.

I thought to have expatiated myſelf in this Eulogical Commendation of the Study of the Law; but when I conſider the Glory of the Thing itſelf, I think it but in vain to light the Sun with Candles; and as no Arguments will perſwade one to love againſt Nature; ſo he, whom the Excellency of the Law itſelf cannot invite to ſtudy it, will never be forced to it with the Fiſt of Logic, or other perſwaſion: Wherefore 'tis now Time to expoſe myſelf to the Cenſure of the Reader, who always judges according to his Capacity or Affection; for which Cauſe, if I were to chuſe my Readers, I could wiſh with *Caius Lucilius*, *Quod ea quæ ſcribo, neque ab indoctiſſimis, neque a doctiſſimis legi, quod alteri nihil intelligerent, alteri plus fortaſſe, quam ipſe de ſe:* That this Treatiſe

tiſe might not be read of the moſt learned, nor of thoſe who are not learned at all, becauſe theſe underſtand nothing, and the others more perhaps than myſelf.

However, I put this Requeſt to all, *Ut ſi quid ſuperfluum, vel perperam poſitum in hoc opere intervenerit, illud corrigant & emendent, vel conniventibus oculis pertranſeant: Cum omnia habere in memoria, & in nullo peccare, divinum ſit potius quam humanum:* That if any Thing be ſuperfluous, and placed amiſs in this Work, that they will either correct and amend it, or without Carping connive at it; ſince to remember to do all Things right, and nothing amiſs, is rather the Part of God than Man: Wherefore, let him which never offended, caſt the firſt Stone. *Bracton, Lib. 1. f. 1.*

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Trials

Trials per Pais.

CHAP. I.

The Derivation of the Word Jury. *The Definition, Antiquity and Excellency of Juries.*

JURY (Jurata) cometh of the *French* Word *Jurer*, *i. e. Jurare*; and ſignifieth in Law, thoſe twelve Men who are ſworn *Judges* in *Matters of Fact*, evidenced by Witneſſes, and debated before them: I call them *Judges*, becauſe, as 'tis the Property of the *Court*, *jus dicere*; ſo it is in the Power of the *Jury* to determine the *Fact*, upon an Evidence *Pro* and *Con.* according to thoſe common *Adages*, *Ad quæſtionem Juris reſpondent Judices*; *Ad quæſtionem Facti reſpondent Juratores:* And as the *Judgment* of the Court ought to be guided by the *Law*, ſo is the *Verdict* of the *Jury* by the Evidence. They of the *Jury* are called *Juratores*, *Jurors*, *a jurando*, as in ancient Laws *Sacramentales*, *a Sacramento præſtando.* Vide cap. 12. Juries. Vide cap. 15.

I need not here divide, and ſhew the Differences of *Juries*, nor the ſeveral Sorts, they being ſo well known, *viz.* The *Grand Jury*, or *Great Inqueſt*, and *Petty Jury*, or *Jury of* The Antiquity and Excellency of Juries.

Life and Death, in Criminal Cauſes; and in Civil Cauſes the *Aſſize Jury*; *Inqueſt of Office*, by ſome called *Inqueſt of Jury*, and *Inqueſt of Office*. Something concerning each of theſe, will incidently be ſpoken of in what follows. As to the Excellency of *Juries*, it appears from their Antiquity.

Sir *Henry Spelman*, *verb.* (*Inquæſtio*) ſays, Trial by *Juries* was uſed in *England*, *Normanis nondum ingreſſis*, *Leg. Ed. Confeſſ. ca.* 38. *Poſtea inquiſiſſet Juſtitia*, i. e. (*Juſtitiarius*) *per Lagamannos*, i. e. (*legales homines*) *& per meliores homines de Burgo*, *vel de Villa*, *vel de Hundredo*, *ubi manſiſſet Emptor*, *&c.*

For as to the Trial by twelve Men, though Mr. *Daniel* and *Polydore Virgil* deny it to be older than the Conqueſt, and the latter ſays, there is no Religion in it, but in the Number; yet he ſtands fairly corrected by that excellent and learned Antiquary, Mr. *Camden*, *p.* 153. who ſays, *Whereas* Polydore Virgil *writeth*, *That* William *the Conqueror firſt brought in the Trial by twelve Men*, *there is nothing more untrue*; *for it is moſt certain and apparent by the Laws of* Ethelred, *that it was in Uſe many Years before*, &c. And whereas *Lamb. verb.* (*Centuria*) ſays, *In ſingulis Centuriis Comitia junto*, *atque liberæ Conditionis viri duodeni*, *ætate ſuperiores*, *una cum Præpoſito Sacra tenentes jurento*, *ſe adeo virum aliquem innocentem haud damnaturos*, *ſontemve abſoluturos*, he refers to the Laws of *Ethelred*, *chap.* 4. cited by the learned *Spelman*, *verb.* (*Jurata.*)

And to the ſame doth my Lord *Coke* refer *Com. ſuper Lit.* 155. and Preface to his third and eighth Report. And as to the Religion in the Number of twelve, my Lord *Coke* gives

Inſtances

Inſtances *ubi ſupra*, and Sir *Henry Spelman*, in *verb.* (*Jurata*) *ſupra*, makes Addition thereto.

So that I may truely ſay, Trials by *Juries* have been uſed in this Nation Time out of Mind, and were contemporary and coeval with the firſt Civil Government thereof, and Adminiſtration of Juſtice; for amongſt the firſt Inhabitants, the *Britains*, the *Freeholders* were uſed in all Trials.

And Trial by *Juries* was (as you ſee practiſed by the *Saxons*) continued by the *Normans*, and confirmed by *Magna Charta*; and was ever ſo eſteemed and prized in this Iſland, that no Conqueſt, no Change of Government ever prevailed to alter it.

'Tis true, Trials by *Juries* before the Time of *H.* 2. were not ſo frequent, becauſe *Sadæ* or *Purgationes*, *Ordalia*, Trials by hot Iron, hot Water, cold Water, Duels, and other ſuperſtitious Ways were then in Uſe; but Trials by *Juries* were here in the *Saxons* Time, and were found here, and not brought in by *William the Conqueror* from *Normandy*; nay, rather ſettled by *Edward the Confeſſor* in *Normandy*, where he a long Time was, and taught many Laws, as you may ſee in the Book of the Cuſtoms of *Normandy*.

Glanvil, *lib.* 2. *cap.* 7. ſays, *Ex æquitate autem maxima prodita eſt legalis iſta inſtitutio*, ſpeaking of theſe Trials in Oppoſition to Duels, *&c.*

Their general Uſe (being the only Triers of *Choſes in fait*, almoſt in all Courts throughout *England*) ſpeaks them a *publick Good*. To be tried by one's Peers is the greateſt Privilege a Subject can wiſh for; and ſo excellent is the Conſtitution of the Government of this King- The Uſe of Juries.

dom, that no Subject ſhall be tried but by his Peers. The Lords by theirs, the Commons by theirs; which is the Fortreſs and Bulwark of their Lives, Liberties and Eſtates: And if the Good of the Subject be the Good of the King, as moſt certainly it is, then thoſe are Enemies to the Good of the King and State, who attempt to alter or invade this fundamental Principle, in the Adminiſtration of the Juſtice of this Realm, by which the King's Prerogative has flouriſhed, and the juſt Liberties of the People have been ſecured ſo many Ages.

Forteſcue, cap. 29.

And what Anſwer ſhall I make to the Princes, *vehementer admiror*, (*videlicet*, Wherefore are not *Juries* uſed in other *Countries*, if they are ſo good?) but that of *Forteſcue* the Learned, who beſt could tell, *ſcil.* That other *Countries* can ſcarce produce one *Jury* ſo well accompliſh'd with *Wealth* and *Ingeny*, as one *County*, nay, one *Hundred* can in *England*.

Things, not Words, moſt regarded in the Law.

But not to dwell in the *Porch*, I will addreſs myſelf to the *Gravity* of the *Law*, where you muſt not ſo much expect the *Flaſh* of *Rhetorick* as the *Light* of *Reaſon*; no, the *Law* knows beſt how to expreſs herſelf in her own *Terms*; wherefore all other *Sciences* muſt learn, with Reverence, to keep their Diſtance, and (as the Golden *Finch* ſings) be glad to have their *Sparks* raked up in her *Aſhes*.

Finch, c. 3.

And ſince an *Iſſue* is *previous*, and the Matter of a Trial, I ſhall firſt give you the Deſcription thereof, and then touch upon the ſeveral Trials allowed by the Law, for the Diſcuſſion of the Truth.

CHAP.

CHAP. II.

Of an Iſſue, and divers Sorts of Trials thereof; and when a Trial ſhall be by a Jury, and when not; when by Certificate, when by the Spiritual Law, when by Battel, and when by an Almanack; when Iſſue ſhall be firſt tried per Pais; *what ſhall be tried by the Court; and what by Examination of the Attorney, Sheriff,* &c.

ISSUE, *(Exitus)* ſaith *Coke*, is a ſingle, certain and material Point, iſſuing out of the Allegations and Pleas of the *Plaintiff* and *Defendant*, conſiſting regularly upon an Affirmative and Negative, to be tried by twelve Men: And it is two-fold, *ſcil.* either ſpecial, as where the ſpecial Matter is pleaded; or general, as in Treſpaſs, *Not Guilty:* In Aſſize, *Nul tort*, *Nul diſſeiſin*, &c. And as an Iſſue natural cometh of two ſeveral Perſons, ſo an Iſſue legal iſſueth out of two ſeveral Allegations of adverſe Parties.

1 Inſt. f. 126. *Omnia unum aliquem ſortiuntur exitum, vel per patriam, vel per Judices terminandum.* Finch Epiſtle.

Iſſues are join'd upon an Affirmative and Negative, and being taken generally it refers to the Count and not to the Writ; and when all is confeſs'd and avoided, it cannot be taken upon the Time.

Special Iſſues are to be taken in one material Point, which may be beſt underſtood and tried.

No Iſſue can be taken after a Judgment *quod eat inde ſine die*; it may be well taken upon a

Preſcription, but not upon a *Poſſeſſion only. Vin. Trial* 58.

Two Negatives ſhall not be ſuffer'd, nor *two Affirmatives* unleſs the Iſſue cannot otherwiſe be tried; but where a Negative goes before and an Affirmative follows, the Iſſue is perfect *et e con.*

It cannot be taken upon a *Negative pregnant* which implies other ſufficient Matter, but upon that which is ſingle and ſimple.

An Iſſue join'd upon an *abſque hoc*, *&c.* ought to have an Affirmative after it, and ſome Iſſues are good upon Matter affirm'd and denied, tho' not expreſs'd in preciſe Words; nor is an Affirmative and a Negative always requiſite to the forming of an Iſſue, as in the Caſe of *Partes finis nihil habuerunt.*

General Iſſues are always in the *Negative*, and contrived in ſuch Words as not to deny the whole Fact in the Count.

Special Iſſues are, where Matter Special is alledged in defence, and both Parties thereupon join Iſſue, or in Demurrer. *Vin. ubi ſupra* 63.

Where the Defence conſiſts in Matter of *Law*, the Defendant *may* plead Specially, but where it is purely of *Fact* he *muſt* plead the general Iſſue; and where a Man hath not any Colour, the general Iſſue is to be taken.

Some Negative Pleas are Iſſues of themſelves, whereto neither Plaintiff or Defendant can reply, otherwiſe than by a *Similiter*, and a Demurrer is an Iſſue in Law to be tried by the Court, and Iſſues ought to be joined upon what is moſt material in the Pleadings, and he who pleads the firſt Negative concludes the Iſſue; but if the Defendant plead in the Negative

gative to the *Writ*, the Plaintiff shall reply in the Affirmative and conclude the Issue. *ibm.* 68.

And to give you likewise his Definition of *Trial*, it is to find out, by due Examination, the Truth of the Point in Issue, or Question between the Parties, whereupon Judgment may be given: And as the Question between the Parties is two-fold, so is the Trial thereof; for either it is *quæstio juris*, (and that shall be tried by the *Judges*, either upon a Demurrer, Special Verdict or Exception: For, *Cuilibet in sua arte perito est credendum, & quod quisque noverit, in hoc se exerceat,*) or it is *quæstio facti*: And the Trial of the Fact is in divers Sorts; First, chiefly, and most commonly, by a *Jury* of twelve Men, (of which Kind of Trial my Design is principally to treat in this Book.)

Trials, 1 Inst. 124. b.

Note, That upon a Demurrer to Part, and Issue to Part, though it is the best Way to give Judgment upon the *quæstio juris* first, yet the Court may try the *quæstio facti* first, at their Discretion. 1 *Inst.* 72, 125. *Latch* 4. *Rol.* Tit. *Trials*, 626, 723.

For by twelve Men are Matters of Fact (for the most part) tried with us in *England*, in Causes both Criminal and Civil; in Causes Civil, after both Parties have said what they can one against another in Pleading; if there arise a Question about any Matter of Fact, it is referred to twelve indifferent Men, to be impanelled by the Sheriff; and as they bring in their *Verdict*, so Judgment passeth. And this the Judge is to declare as the Law is upon the Fact found: For the Judge saith, the *Jury* finds thus, and then the Law is thus, and so we judge. For the Law arises upon the Fact.

Proceedings in Civil Causes.

For Criminal Causes the Course is thus: At the *King's Bench* for *Middlesex*, and at the great and general *Assizes*, and at the general *Sessions of*

Proceedings in Criminal Causes.

the Peace, there is one *Jury*, called the *Grand Jury*, which conſiſts commonly of twenty-four ſubſtantial Men, out of one or more Hundreds within the County, returned by the *Sheriff*, and they are to conſider of all Bills of Indictment preſented to them, which they either approve of, by writing from Bill, or diſapprove, by writing upon them not found; and thoſe which they approve of, are to be tried by another *Jury* called the *Petit Jury*. Or the *Grand Jury* may charge any Perſon, upon their own *Preſentment*, which will be of the Force of an Indictment; and the Party charged may traverſe the Offence, and bring it to be tried by a *Petit Jury*.

Some leſſer Matters in theſe Courts are proceeded upon without *Jury*, and ſome Things are removed by *Certiorari* into higher Courts, and then muſt be tried there; and that Thing, to which there is a Traverſe put in, muſt be tried and ended by a *Petit Jury*, which (for the moſt part) in all Civil and Criminal Cauſes are but twelve Men, which ought to be Free Men, not Villains or Aliens, and lawful Men not outlawed, and alſo Men of Worth and Honeſty.

But becauſe it is neceſſary to be known, that there are many Ways allowed by the Common Law to try Matters of Fact, beſides this by *Juries*, I will here repeat ſome of them: And for this, firſt hear the *Oracle*, who tells you, that he had read of ſix Kinds of *Certificates* allowed for *Trials* by the Common Law.

1 Inſt. 74.

Trials by Certificate.

1. The doing of Service by him that holdeth by *Eſcuage* in *Scotland*, was to be tried by the *King's Marſhal* of the Army, *Per ſon Certificate*

tificate en eſcript ſouth ſon ſeal que ſerra mis a Juſtices, ſaith *Littleton*.

2. If it be alledged in Avoidance of an Outlawry, that the Defendant was in Priſon at *Bourdeaux*, in the Service of the *Mayor* of *Bourdeaux*, it ſhall be tried by the Certificate of the Mayor of *Bourdeaux*. *Note*; This was when *Bourdeaux* was Parcel of the Dominions of the King of *England*. *Rol.* Tit. *Trial*, *f.* 583.

3. For Matters within the Realm, the Cuſtom of *London* ſhall be certified by the Mayor and *Aldermen*, by the Mouth of the *Recorder*. *Vide apres* 14.

4. By the *Certificate* of the *Sheriff*, upon a Writ to him directed, in Caſe of Privilege, if one be a Citizen or Foreigner.

5. Trial of Records by *Certificate* of the *Judges*, in whoſe Cuſtody they are by Law. All theſe be in Temporal Cauſes.

6. In Cauſes Eccleſiaſtical, as Loyalty of Marriage, general Baſtardy, Excommengement, Profeſſion: Theſe and the like, are regularly to be tried by the *Certificate* of the *Ordinary*. *Vide apres* 13.

If the *Defendant* claim his Privilege as a Scholar of the Univerſity of *Oxon*, of ſuch a College or Hall: This ſhall not be tried by *Certificate*, but *per Pais*. *Rol.* Tit. *Trial*, 583. *N.* 1.

Concerning *Certificates* of Spiritual Perſons, *vide Rol. ibid* 591, 592.

7. A Record ſhall be tried by the Record itſelf, and not *per Pais*. *(a)* But Matter of Fact Records.

(a) A Matter of Record before the Juſtices ſhall not be put in Trial *per Pais*, whether it be ſo as the Record proves, or not; but it ſhall be tried by the Record itſelf. *Vin. Abr.* Tit. *Trial*, 9 *pl.* 1.

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concerning a *Record* is triable by a Jury; as whether a Plaint, *&c.* was levied according to the Cuſtom; and *non proſecutus eſt ullum breve*, is triable by the Country. *Hob.* 244. *Hutt.* 20. So if a Statute hath two Seals, or but one, 1 *Leon.* 229. 2 *Cro.* 375. 1 *Inſt.* 125. *b.* So in a *Per quæ ſervitia*, if the Tenant *ſays, that he did not hold of the Conuſor the Day of the Note levied*, this ſhall be tried *per Pais*. *Vin. Abr.* Tit. *Trial* 9. *pl.* 3. cites 11 *H.* 4. 72. *b.* In Eſcape upon a *Cepi* returned, *Ne unques in ſon gard* ſhall be tried *per Record*; but upon a *Capias* not returned, the Priſal ſhall be tried *per Pais*. So ſhall an Action brought by *Covin*, for the *Covin* is not of Record. In *Scire Facias* by the King, to have Execution of a Judgment in *Quære Impedit*, if the Defendant pleads, that after the Recovery the King preſented thereto, and ſo Judgment executed; and the Iſſue is, Whether the King preſent by Cauſe of the Judgment, or by Cauſe of a Voidance after the Death of *J. S.* who was preſented by a Stranger after the Voidance upon which the King had Judgment; this ſhall be tried *per Pais*, and not by Record, though it was ſaid, that it is of Record in Chancery for what Cauſe the King preſented. *Vin. Abr.* Tit. *Trial* 10. *pl.* 11. And for this Reaſon, in pleading of *Letters Patent* the Place need not be alledged where the *Letters Patent* were made, becauſe the *Defendant* cannot plead *Nul tiel Record*, but muſt plead *Non conceſſit*, and then the Jury ſhall come from the Place where the Lands lie. *Vide l.* 6. *f.* 15. 1 *Inſt.* 117, 260. *Plo. Com.* 231. But upon a *Non eſt factum* pleaded to a *Deed*, there muſt be a Place alledged where the *Deed* was made, becauſe (though the *Deed*, as to the Matter

Mixt with Fact.

Deed.

Matter of Law, be triable by the Court, yet) the Sealing and Delivery thereof, and other Matters of Fact, must be tried by the Jury; so that in this Case of a *Deed*, there is a Trial *per Pais*, and by the Court. 1 *Inst. f.* 35. *Vide apres* 15.

What Issues shall be tried *per Record.*

The Issue upon an Indictment, or Acquittal thereupon, it shall be tried by the Record. *Vin. Abr.* Tit. *Trial* 9. *fol.* 2. cites 20 *H.* 6. 10. *b.* If the Issue be *upon an Allowance of a Protection in banco*, it shall be tried by the Record. *Vin. Abr.* Tit. *Trial* 9. *pl.* 4. cites 20 *H.* 6. 10. *b.* In Debt against the Warden of the Fleet for an escape, if the issue was where he was imprisoned upon the Execution, or for other Cause, it shall be tried by the Record. *Ibid. p.* 6. If a Man justifies an Imprisonment, because he is a Justice of the Peace; this Matter shall be tried by the Record, and not *per Pais*. *Vin. Abr.* 10. *pl.* 9. In debt upon an escape against the Mayor of the Staple for suffering *J. S.* in Execution on a Statute Staple, to go at large, if Defendant says that he was not in Prison upon the Execution, but upon a Plaint there; this Issue shall be tried *per Pais*; because the Defendant is to certify the Record, if he shall be tried by it, which is not reasonable in his own Cause; for peradventure he will certify it falsly. If the Issue be whether a supposed Statute Merchant be true or forged, it shall be tried by the Record where it was acknowledged, if the Mayor who took it be alive, though he be out of the Office now; for it is a Matter of Record. 17 *E.* 3. 39. *b.* So if the Mayor be dead; for it continues a Record triable. *Contra* 17 *E.* 3. 49. *b.* *Vin. Abr.* Tit. *Trial*

Trial 10. Whether a Place be within the Ligeance of the King of *England* or in *Scotland*. A *Fine ſur Releaſe* rendering his Body in Diſcharge of his Bail, ſhall be tried by the *Record*. *Rol.* Tit. *Trial*, 574. The Time of inrolling *Letters Patent* ſhall be tried *per Pais*. *Co. Lib.* 4. 71. 9 *H.* 7. 2.

Office raſing a Record.

Seiſin of an Office in any Court, or raſing a *Record* in any Court, by the *Filazers* and *Attorneys* of the Court.

Peers. The Lords may command a Jury to be impanelled to try Miſdemeanors.

8. A *Peer* of the *Realm*, *i. e.* a *Lord* of the *Parliament*, ſhall upon an Indictment of Treaſon or Felony, Miſpriſion of Treaſon, and Miſpriſion of Felony, be tried by his *Peers*, without Oath. 1 *H.* 4. 2. But in Appeal at the Suit of the Party, he ſhall be tried *per probos & legales homines Juratores*. 10 *E.* 4. 6. *&c.* becauſe that is not the King's Suit, but the Party's. *Vide lib.* 9. 31. *Le caſe del Abbot de Strata Marcella*. And in a *Præmunire*, his Trial ſhall be *per Pais*. *Bulſt.* 1 *Part*, 198. Dutcheſſes, Counteſſes or Baroneſſes, although married, ſhall be tried as *Peers* of the *Realm* are; but ſo ſhall not Biſhops and Abbots. *Stam.* 153. 20 *H.* 6. 9. 2 *Inſt.* 48, 49, 50, 156. *b.* 294. 2 *Inſt.* 30. But Biſhops ſhall be tried by the *Peers* in Parliament.

12 Rep. 93. Lamb. Inſt. f. 520. 3 Inſt. 30.

9. Always when *Reaſonableneſs* is in queſtion, it ſhall be determined by the *Court* in which the Action dependeth; ſo ſhall the Expoſitions of Statutes, and the Maxims and *General Cuſtoms* of the Realm, but it is otherwiſe of particular Cuſtoms, for they ſhall be tried *per Pais*. *Vin. Trial*, 22.

Nothing the Judges of Record do, *as Judges*, ſhall be tried by the Country. *Idem* 23.

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The Cuſtoms and Uſages of every Court ſhall be tried by the Judges of the ſame Court, if they are pleaded in the ſame Court, *ibid.* and many other Things are tried by the Judges; as the Reaſonableneſs of a Fine of an Offender, or upon Surrender of a Copyhold Eſtate; and ſo it is of Cuſtoms, Services, and alſo of the Time that a Tenant at Will ſhall have to carry away his Goods; and theſe Caſes come under the Rule which makes *Matter of Law to be tried by the Judges. Vide* 1 *Inſt. f.* 59. *b.* And in ſome Caſes Matter of Fact ſhall be tried by the Judges; as if the Plaintiff appear by *Attorney* in Court, and then the Defendant pleads that the Plaintiff is dead; if one appears, and ſaith he is the Plaintiff, whether he is or not, ſhall be tried by the *Judges*; *lib.* 9. 30. So the Nonage of an Infant, generally by Inſpection of the Court. But in many Caſes, Infancy ſhall be tried *per Pais*, as if an Infant appear by Attorney, in *Error*, this ſhall be tried *per Pais*, *lib.* 9. 31. and ſo it is in an *Ætate probanda*.

Cuſtoms of Courts, &c. tried by the Judges.

Inſpection. V. Bulſt. 1 par. 131. Rol. *Tit.* Trials, 571.

Maihem: In an Appeal of *Maihem*, the Court may adjudge this upon the View, at the Prayer of the Defendant.

Maihem.

Maihem may be tried again by the Court, by Inſpection for Increaſe of Damages upon the Inſpection of Surgeons, if the Court be in Doubt, and the Adjudication made upon ſuch View is peremptory and concluſive to each Party; but then theſe Things are to be conſidered; *Firſt*, It muſt be a *Maihem*, and not a bare Wounding. *Secondly*, The *Maihem* muſt be aſcertained in the Declaration, ſo as that it may appear that the *Maihem* inſpected, and the *Maihem* in the Declaration be all one; as was reſolved,

Mich.

Mich. 21 *Car.* 2. *B. R.* in the Caſe of *Badwel* and *Burford*; the principal Caſe of which was, That the Defendant whipp'd the Plaintiff's Horſe, which made him throw her, and another Horſe trod on her, and maim'd her Hand; and adjudged no Increaſe of Damages in that Caſe, being a conſequential, and not a direct *Maihem*. *V. Rol. Trial*, 578.

Trial by Inſpection becauſe of Record.

Nonage in a *Writ of Error* to reverſe a Judgment, or a Fine of the Tenant by Reſceit of one vouched *come deins age, & iſſint praie le parol a demurrer*, Nonage *ſur aid praier en Appeal, Audita Querela*, to avoid a *Statute, Recognizance, Accompt*; and in all Actions where 'tis prayed that the *parol demurroit*, Nonage ſhall be tried *per Inſpection*. But in Accompt againſt one of full Age, if he plead Nonage when he was Bailiff, this cannot be tried by Inſpection. *Rol.* Tit. *Trials*, 572. How this Trial by Inſpection ſhall be, *vide Rol. ibid.* at large.

In all Caſes where the Matter may be tried by Inſpection, Examination or Diſcretion of the *Juſtices*, if they doubt the Matter, they may refuſe to try this, and compel the Parties to a Trial *per Pais*, or other Proofs. 21 *H.* 7. 40. *per touts Juſtices.*

The Court may examine the Infant upon a *Voier dire*, whether he be within age, and may examine the Godfather and Godmother. In all Caſes where the Matter may be tried by Examination or Diſcretion of the Juſtices, they may if in Doubt refuſe it, and compel the Party to put it in Trial of the Country; as in Infancy the Court may refuſe to try by Inſpection, and compel the Party to try it *per Pais.*

In Error by an Infant to reverſe *a Fine*, after Inſpection and found *within Age*, the Judgment may be reverſed after his full Age. But if an Infant ſuffer a *Common Recovery* by Guardian as Tenant to the Præcipe, and within Age brings Error to reverſe it; yet the Infancy, admitting it is erroneous, ſhall not be tried by *Inſpection*, as in the Caſe of a Fine. Though in the Caſe of *Raby* and *Robinſon*, *Keb.* 892. on a Recovery ſuffered by an Infant as Vouchee, it was ſaid by *Twiſden*, and allowed by *Keeling*, as an excellent Difference, as beſt to prevent Delay, that the Trial may be by *Pais*, or Inſpection. *Vin.* Title *Trial* 7, 8.

The Court is Judge of the Infancy, and not the Jury, where the Infant hath been inſpected by the Court, and the Infancy recorded; as in the Caſe of *Fletcher* and *Vidian* in *Styles* 472. And in the Caſe of *Couſins*, 1 *Vent.* 69. in Error to reverſe a Fine for Infancy, the Party being in Court was inſpected, and upon Affidavits and a Copy of the Pariſh Regiſter of the Party's Age, the Inſpection was recorded by the Court who declared the Iſſue of Infancy might be tried at any Time after full Age. *Vin. ſup.*

10. There are many Trials allowed by the Common Law, by Witneſſes only, without a *Jury*; as of the Life and Death of the Huſband, in *Dower*; ſo the *Proof* of a *Summons*, or the *Challenge* of a *Juror*, muſt be tried by Witneſſes; and regularly, the Proof ought to be by two or three Witneſſes. 1 *Inſt.* 6. And divers other Things muſt be tried by Examination of the Parties and Witneſſes; as the Trial by *Wager of Law*, &c. *Finch* 423. Trials by Witneſſes and Proofs. V. 4 Inſt. 278.

Nonage

Glanvil, lib. 13. cap. 15. Nonage was anciently tried by the Verdict of eight Men, but now by Inſpection; and full Age by twelve Men.

Appeal. In an Appeal by a *Feme* of the Death of her Huſband, if the Defendant ſay that the *Baron* is alive in another County; or generally, that he is alive, this ſhall be tried by *Proofs*, 41 *Aſſize* 5. *Vide Rol.* Tit. *Trial*, 577. what ſhall be tried by *Proofs* in an *Aſſize*, and what not.

Annuity. In a Writ of Annuity, if the Defendant ſay the Party is dead in *Britain*, this ſhall be tried by *Proofs*. 25 *E.* 3. 70.

Dukes, &c. 11. *Duke* or no *Duke*, *Earl* or no *Earl*, *Baron* or no *Baron*, ſhall be tried by the King's Writ, *lib.* 5. 35. *lib.* 6. 53. But *Dutcheſs* or no *Dutcheſs*, &c. by Marriage, ſhall be tried *per Pais*, becauſe the Marriage is Matter of Fact.

League. 12. In a Plea *del alien nee*, the *League* between the *King* and the Sovereign of the *Alien*, ſhall be tried by the Record of the *Chancery*, becauſe every *League* is of Record. *Lib.* 9, 32.

Manor. 13. If a *Manor* be *Ancient Demeſne* or not, it ſhall be tried by the Book of *Domeſday*, which is in the *Exchequer*. But whether certain Acres be Parcel of ſuch a Manner or no, it ſhall be tried by the country. *Ibid.*

Courts not of Record. 14. The Proceedings of a Court which is not of *Record* (as the County-Court, the Hundred-Court, the Court-Baron, &c.) ſhall be tried by the Country, and not by the *Rolls* of the Court, becauſe they are no Record. *Ibid.* *Co. Lit.* 117. *b.*

By Charters and Records. 15. The Privileges and Liberties of Courts of Record, Cities and Boroughs, muſt be tried by their Charters and Records.

16. When

16. Whether the *Ordinary* committed *Administration* to the Plaintiff, or whether the Teſtament was proved before the *Ordinary*, or whether ſuch a Will be the Will of the Party, or whether he died Inteſtate or not? In all theſe Caſes the Trial ſhall be *per Pais*; becauſe *Probate* of Wills, and conſtituting Adminiſtrators, did not belong to *Eccleſiaſtical Judges originally*, but were given to them of late. But Trial thereof is left to the Common Law, and was not given to them. *Lib.* 9, 32, 40. Wills and Adminiſtrations.

An Executor brings an Action of Debt; the Defendant pleads that the Teſtator never made him Executor; if the Plaintiff gives in Evidence the *Probate* of the Will, the Defendant ſhall only give Evidence in *Diſaffirmance* of the Plaintiff's Probate, which is Matter of Fact; but as to Matter of Law, the Court gives Credit thereto; as where another Will was made, for there the Parties might have appealed; but if the Seal be counterfeit, or the *Probate* forged, it is triable *per Jury*. *Adj. Paſch.* 20 *Car.* 2. *B. R. Noel* and *Wells*. *Vide Wentworth's Executor* 69. 1 Lev. 235.

The Trial of all Criminal Matters is by the Country, and the Party accuſed cannot be denied it, unleſs it be his own Fault; as where he is mute, and will not put himſelf upon his Country in due Time; for then without farther Trial Judgment *de Pain fort & dure* is paſſed by the *Judges* upon him. *Staundf. pl. Coron.* 150. Criminal Matters.

16. In an Action upon the Caſe for calling one *Baſtard*, the Defendant juſtified that the Plaintiff was a *Baſtard*; and it was awarded, that this ſhould be tried *per Pais*, and not by Plo. Com. 267. Special Baſtardy.

the *Ordinary*. *Hob.* 179. And ſo a Plea that the Plaintiff was born at ſuch a Place before Marriage, this is *ſpecial Baſtardy*, and ſhall be tried *per Pais*. *Plow.* 14. *Dyer* 89. *vide hic cap.* 22.

Cuſtoms of *London*.

17. When an Iſſue is taken, whether a *Cuſtom* or no *Cuſtom* in *London*, if the Mayor, Commonalty and Citizens be Parties, or intereſted in the Action, this Cuſtom ſhall be tried by a *Jury*, and not by the Certificate of the *Mayor* and *Aldermen*, by the *Recorder*. *Hob.* 85. *Day* and *Savadge*'s Caſe. *Devant* 3. *Style* 137. *Moor* 871. *Vide apres* Tit. *Viſne*. *Roll*. Tit. *Trial*, 579, 580.

The Cuſtom of *London* ſhall be certified by the *Mayor* and *Aldermen*, by the Mouth of the *Recorder*. *Co. Lit.* 74.

In an Information upon the Statute 5 *Eliz.* for uſing a Trade to which the Defendant was not bound an Apprentice, if the Defendant plead a Cuſtom of the City, That he who is free of one Trade, may uſe any other; this ſhall be tried by the Mouth of the *Recorder*. *Roll*. Tit. *Trial*, 579. *G. pl.* 3.

Note this Difference, he that is free of one Manual Trade, cannot uſe another Manual Trade: but it is otherwiſe of thoſe Trades which are not Manual: In ſuch, one that is free of one, may uſe another by the Cuſtom.

Liberties claimed by Cuſtom in *London*, the Cuſtom of making Indentures of Apprenticeſhip void, if not inrolled *(a)* within a Year, the Cuſtom

(*a*) If the Indentures be not inrolled before the Chamberlain within the Year, upon Petition to the Mayor and Aldermen, *&c.* a *Scire facias* ſhall iſſue to the Maſter to ſhew Cauſe why not inrolled; and if it was through the Maſter's

Custom to devise Lands, Foreign Attachment, *&c.* shall he tried by the Mouth of the *Recorder*. But the Issue, whether there be a Market every Day in the Week in *London*, shall be tried *per Pais*, because the Issue is not upon the Custom. *Roll.* Tit. *Trials*, 580. *Vide hic cap.* 8.

18. A Matter of Record being mixt with a Matter of Fact, shall be tried *per Pais*, and not by the Record. *Hob.* 244. *Peter* and *Stafford*'s Case.

Matter of Record mixt with Matter of Fact.

19. In Writs of Right and Appeals that touch Life, Trial may be by *Battel*, or by *Jury*, at the Defendant's Choice; the *Battel*, in a Writ of Right, must be by *Champions* (who must be Freemen) but in an Appeal it must be in proper Person. The *Champions* in a Writ of Right are not bound to fight longer than until the Stars appear; and if the Champion of the Tenant can defend himself until then, the Tenant shall prevail: The *Judges* of the Court of *Common Pleas* are *Judges* of the *Battel*, in a Writ of Right; and the *Judges* of the *King's Bench*, in an Appeal of Felony. It seems they seldom or never killed one another in this Trial by *Battel*, for their Weapons are but Battoons, and he that was vanquished, was presently, upon *Proclamation* made, to acknowledge his Fault in the Audience of the People, or else to cry *Cravant* in the Name of Recreantise; and upon this Judgment was to be given; and after this the *Recreant* should *amittere liberam legem*,

Trials by Battel. Writ of Right. See the Manner of it 1 H. 6. 6. 7. *Bro. Droit de recto*, pl. 20.

Master's Default, the Apprentice may sue out his Indentures; otherwise if through the Fault of the Apprentice; as if he would not come to present himself before the Chamberlain, *&c.* for it cannot be inrolled unless the Infant is in Court and acknowledges it. 2 *Roll. Rep.* 305. *Palm.* 361. See 1 *Mod.* 271.

that is, ſhould become infamous, *&c.* 2 *Inſt.* 247. *Finch* 421. *lib.* 9. 31. *Mirror of Juſtice* 161, 162, *&c.* 1 *Inſt.* 294.

Grand Aſſize. *Glanvil* ſaith, The Trial by Grand Aſſize came by the Clemency of the Prince. *Eſt autem* (ſaith he) *Magna Aſſiſa Regale quoddam beneficium, Clementia Principis de conſilio Procerum populis indultum.*

For the Trial of Treaſon, Murder and Felony, as well upon Appeals as upon Indictments, ſee *Staundf. Pleas of the Crown.*

By *Glanvil, cap.* 1. *lib.* 14. it appeareth, the Trial of theſe Crimes by the old Law was this: If there were no direct Proof nor Accuſer, or if there was any Accuſer or direct Proof, yet if the Party denied the ſame, then the Trial was by Wager of Battel, if the Party accuſed was not ſixty Years old, and of ſound Limbs; but if he was older or not ſound, then he was to be tried *per judicium Dei*, namely, *per calidum ferrum vel aquam*, that is, if he was a Freeholder, he was to run bare-foot and bare-leg'd over a Row of hot Iron Bars; and if he paſſed three Times without Stop or Fall, he was acquitted. And if he was a meaner Perſon, called *Ruſticus*, he was to run through Veſſels filled with ſcalding Water.

Per judicium Dei.

Recovery by Default. 20. In a Writ of *Diſceit*, upon a Recovery by Default, the Trial ſhall be, if the Judgment was given upon the *Petit Cape*, by the *Summoners*, if upon the *Grand Cape*, by the *Summoners*, *Pernors* or *Veiors*, and not *per Pais*; So if a *Recovery* by Default in a real Action be pleaded, to which the other ſaid, *Nient compriſe*, this ſhall not be tried *per Pais*, but by the *Summoners* and *Veiors*. *Lib.* 9. 32. See *Viner, Trial*, 28, 29.

Summoners, Pernors, Veiors.

Nient Compriſe.

En

En Assise if the Issue be, whether the Land was extended in an *Elegit*, &c. this shall be tried by the Extendors joined with the Assize. 31 *Ass.* 6. *vide Rol.* Tit. *Trial*, 581, 582.

Of Trials *per l'Escheator*, *per Examination*, *vide ib.* Escheator, Sheriff.

In an Appeal, if the Exigent be awarded, and the Party pray a Writ to enquire of the Goods and Chattels, and to seize them, this may be awarded to the Escheator, or Sheriff, at the Election of the Court. 41 *Ass.* 13. *vide hic cap.* 24, 27.

21. In Debt upon a simple Contract, Detinue, &c. the Trial may be by *Wager of Law* or *per Pais*, at the Defendant's Election. But when the Defendant wageth his Law, he ought to bring with him Eleven of his Neighbours, who will avow upon their Oath, that in their Consciences he said true, so as he himself must be sworn *de fidelitate*, and the Eleven *de credulitate*, *ib. Finch* 423. and 1 *Inst.* 295. you may read excellent Learning concerning this Trial. Wager of Law.

22. If *Profession* be denied, it shall be tried by the Court Christian, but if the Time of the *Profession* be in Issue, this shall be tried by the Country, *lib.* 4. 71. So though an Inrolment, or other Matter of Record, cannot be tried *per Pais*, yet the Time when the Inrolment was made, may be tried *per Pais*; so whether the Party appeared in such a *Court*, or on such a Day, &c. shall be tried *per Pais*. *Cro.* 3 *Part*, 131. So whether one was Sheriff such a Day or not, *Cro.* 1 *Part*, 421. *Admission*, *Institution*, *Plenarty* and *Ability of the Person* shall be tried by the Bishop: But Induction shall be tried by the Country, and so shall Avoidance by Resignation. *Dyer* 229. *Moor* 61. And void or not void, shall be tried *per Pais*, 1 *Inst.* 344. and *Plenarty* if the Profession. Inrolment. Appearance. Sheriff. Admission, Plenarty, &c.

Clerk be dead. *Mirror of Juſtice* 324. *lib.* 6. 49. The Cauſe of Refuſal of a Clerk by the Biſhop ſhall be tried by the *Metropolitan*, if the Clerk be living; but *per Pais*, if he be dead. *l.* 5. 58.

Per Spiritual Law. *Vid. hic cap.* 16.

Ability ſhall be tried by the *Ordinary*, if the Clerk be alive; but if dead, then *per Pais:* Inſtitution, Reſignation, full or not full, Profeſſion, unleſs alledged in a Stranger, Prior removeable at Will or perpetual, general Baſtardy, the Right of Eſpouſals, Divorce, *&c.* ſhall be tried by the *Biſhops:* But in many Caſes, theſe Matters being mixed with other Circumſtances, ſhall be tried *per Pais.*

Per Pais. For although Inſtitution, Reſignation, *&c.* are Spiritual, yet Avoidance, Induction, *&c.* are notorious to the Country.

As if the Church be void by Reſignation, or void or not void, Induction, Inſtitution and Induction together, becauſe the Common Law ſhall be preferred, Prior or not Prior.

Nota; Marriage of a Wife in Poſſeſſion ſhall be tried *per Pais*, but not the Right of Marriage, as *ne unques accouple in loyal Matrimony*, this Right muſt be tried by the Biſhop's Certificate.

Baſtardy alledged in a Stranger to the Writ, or in one dead, or Abatement of the Writ, whether a Feme be a Feme Covert in Poſſeſſion, *&c.* in Treſpaſs by Baron and Feme, *Nient ſon feme* ſhall be tried *per Pais.* And ſee in *Rol.* Tit. *Trial*, 584, *&c.* many Caſes where Baſtardy, Marriage, *&c.* ſhall be tried *per Ley* Spiritual, or *per Pais.* The Time, *&c.* of Conſecration of a Biſhop, and of other Spiritual Matters, ſhall be tried *per Pais.* By what Spiritual Perſon the Trial ſhall be, and for what Caſe, *vide ib.*

Lecn. fol. 53. *Leigh* and *Hammer*'s Caſe.

Ideot.

23. An *Ideot* found ſo from his Nativity by Office, may come in Perſon in the *Chancery*, before

fore the *Chancellor*, and pray that before him and such Justices or Sages of the Law, which he shall call to him, (who are called the Counsel of the King) he may be examined whether he be an *Ideot* or no; or by his Friends he may sue a Writ out of *Chancery*, retornable there, to bring him into the *Chancery*, *ibid. coram nobis & concilio nostro examinand'*. *Lib.* 9, 31.

24. If it be in Question, Whether the *Sheriff* made such a Retorn or not, it shall be tried by the *Sheriff*: If whether the *Under-Sheriff* made such a Retorn or not, it shall be tried by the *Under-Sheriff*: If the Question be, Whether such a one be *Sheriff* or not? he is made by Letters Patent of Record, and therefore it shall be tried by the Record. *Ib. Cro.* 1 *Part*, 421. Sheriff. Retorn.

25. If an *Approver* say, That he commenced his *Appeal* before the *Coroner per dures*, this shall be tried by the *Record* of the *Coroner*; and if it be found that he did it without *dures*, he shall be hanged. *Broke*, *Corone*, 74. Dures.

26. The Trial, Whether a *Statute* shewed before, be the true *Statute* or not, shall be by the Examination of the *Mayor* and *Clerk* of the *Statutes*, which took the *Statute*, and not *per Pais*, *ib.* Whether a *Statute* hath two Seals or not, shall be tried *per Pais*. *Leon.* 228, 229. Statute.

27. In Assize, the Tenant said, That the Lands were taken into the King's Hands, this shall be tried by the Examination of the *Escheator*. *Rol. Trial*, 582. *L.* 1. Escheator.

28. If one in Avoidance of an *Outlawry*, alledge that he was in Prison at *Bourdeaux*, *ultra mare*, *in servitio Majoris de Bourdeaux*, this shall be tried by the *Mayor*'s Certificate; and in such like Cases, other Trials shall be by the *Certificate* Certificate.

cate of the *Marſhal of the Hoſt*, and by the *Captain of Calais*, and alſo by Meſſenger, of a Thing done beyond Sea. *Ib.* 583. *N.* 3.

Meſſenger.

If the Defendant claim Privilege as Member of a College in the Univerſity, and Iſſue be thereupon joined, it ſhall be tried *per Pais*, and not by Certificate of the Vice-Chancellor of the Univerſity or Principal of the College. *Vin. Trial*, 38.

The Stat. 1 *Eliz. c.* 1. "Ordains, That "every Biſhop ſhall tender the Oaths to each "of the Clergy in his Dioceſe, and ſhall certify "the Refuſal into *B. R.*" 'Tis upon this Certificate the Refuſer ſhall be there indicted, though the Certificate be by the Biſhop's Chancellor. *Ibid.* 53.

29. At the *Petit Cape*, the Tenant ſaid, That he was impriſoned three Days before the Default, and three Days after; this ſhall be tried by the Examination of the Attorney. *Nient Attach. per* 15 *Jours in Aſſize* ſhall not be tried *per Pais*, but by Examination of the Bailiff. *Ib.*

Petit Cape.

Bailiff.

30. It ſeems an *Almanack* is ſo infallible, that it hath countervailed the Verdict of a *Jury*. For in Error of a Judgment given in *Lynne*, the Error aſſigned was, That the Judgment was given at a Court held there on the 16th Day of *February*, 26 *Eliz.* and that this Day was *Sunday*, and it was ſo found by Examination of the *Almanacks* of that Year: Upon which it was ruled, that this Examination was a ſufficient Trial, and that a Trial *per Pais* was not neceſſary, although it were an Error in *Fact*; and ſo the Judgment was reverſed. *Cro. 3 Part*, *fol.* 227. 1 *Leon.* 242. the ſame Caſe, and there it

Almanack.

it is ſaid, that it was twice ſo ruled before. See *Poſtea Ch.* 15. *p.*

31. In ancient Times there was a Trial in Criminal Cauſes called *Ordalium*; for upon Not guilty pleaded, the Defendant might put himſelf upon God and the Country (which is upon the Verdict of twelve Men, as is the Uſe at this Day), or elſe upon God only; and then if he was a Freeman, he was to be tried by Fire, that is, he was to *go barefooted over Nine Plow Shares Fire-hot*; and if he was not hurt by this, then he was to be acquitted, otherwiſe condemned; and this was called *The Judgment of God*, becauſe the Defendant had put himſelf upon God only. But if he was a Slave, then his Trial was to be by Water, and that divers Ways, which all appear in *Lambard* Word *Ordalium.* From which Kind of Trial I preſume we ſtill retain this Expreſſion of an innocent Perſon, *That he need not fear Fire or Water:* This Manner of Trial was firſt prohibited by the *Canons*, and afterwards totally aboliſhed by Parliament, ſo as to be no Trials but by Jury. The Trial by *Battel* (*a*) is likewiſe prohibited by the *Canons*, but not by *Parliament*, as you may read in the *Ninth Report*, *fol.* 32. Ordeal. Battel.

32. When the Matter alledged extendeth to a Place at the Common Law, and a Place within Which Trial ſhall be firſt.

(*a*) Trial by Battle ſtands *repealed by Canons only*, though ſufficiently *abrogated* by diſuſe. *Vin. Abr.* Tit. *Trial*, 33. Yet in P. 34. from *Petty's Conſtit.* he tells us, That from the Conqueſt till *Hen.* 7. Trials might be *by God and his Country*, or the Offender might elect to be tried by *God alone*, as by Ordeal, which was *repealed* by Parliament in *Hen.* 7. Time.

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a Franchiſe, it ſhall be tried at the Common Law. 1 *Inſt.* 125. 4 *Inſt.* 221.

Trial in one Iſſue binds in another.

In what Caſes a Trial in one Iſſue ſhall bind the ſame Party in another Iſſue, upon the ſame Matter.

In Debt againſt two *per ſeveral Præcipes*, if one plead a Releaſe, and they are at Iſſue upon the Deed, and the other plead the ſame Iſſue, if it be found the Deed of the Plaintiff in the former Iſſue, this ſhall bind him in the ſecond Iſſue. 12 *H.* 4. 8.

In Treſpaſs, if the Defendant plead *Villenage* in the Plaintiff, if this be found againſt the Defendant, this ſhall bind him in the ſame Iſſue, in another Action in the ſame Court, betwixt the ſame Parties. 44 *Aſſ.* 5.

If a Man be found guilty of a Conſpiracy upon an Indictment at the King's Suit, this ſhall not bind in a Writ of Conſpiracy at the Suit of the Party, but he may plead Not guilty. 27 *Aſſ.* 13.

If a Man upon an Indictment of Extortion, confeſs it, and put himſelf in the King's Grace, and makes Fine, *&c.* this ſhall bind him, and he ſhall not plead Not guilty to the Suit of the Party; for a Confeſſion is ſtronger than a Verdict. 27 *Aſſ.* 57. *per Sharde.* *Vide Rol.* Tit. *Trial*, 625.

In what Caſes Trial againſt one ſhall be againſt others.

He which is not Party to the Iſſue, nor can have Attaint, or challenge the Inqueſt, ſhall not be bound by the Trial. 11 *H.* 4. 30.

And therefore in treſpaſs againſt two, and one pleads a Releaſe, and the other juſtifies as his Servant; if the Iſſue be found againſt the Maſter, it ſhall not conclude the Servant. 11 *H.* 4. 30. *Rol. Ib.* 625. *K.* 2.

One

One ſhall not be compelled to try a Traverſe the ſame Seſſions he makes it; for a Man ſhall have Time to make his Defence, and is not ſuppoſed to be ready to anſwer ſudden Objections; and for this Reaſon many Judgments upon Indictments have been reverſed. *Rol. Trial*, 625. *L.* 1. At what Time the Trial ſhall be.

Juſtices of *Oyer* and *Terminer*, nor Juſtices of Peace, cannot inquire and determine the ſame Day: But Juſtices of *Gaol-Delivery* and Juſtices in *Eyre* may. *Ibid.*

Juſtices of Peace cannot proceed to the Delivery of a Perſon indicted of Felony before them the ſame Day he is arraigned. 22 *Ed.* 4. *Coron.* 44. Declared by all the Juſtices of *England*, to be obſerved as a Law. *Ibid.*

In an Indictment in *B. R.* or in the ſame County; and removed thither, the Defendant may be arraigned and tried the ſame Day. For the *King's Bench* is a Court of *Eyre* for all Offences in that County: Otherwiſe of an Indictment removed out of another County. *Vide Rol.* Tit. *Trial*, 626. many Caſes *de ceo.*

33. All Matters done out of the Realm of *England*, concerning War, Combat, or Deeds of Arms, ſhall be tried and determined before the Conſtable and Marſhal of *England*, before whom the Trial is by Witneſſes, or by Combat, and their Proceeding is according to the Civil Law, and not by the Oath of twelve Men. 1 *Inſt.* 261. Wherefore, if the King's Subject be killed by another of his Subjects in any foreign Country, the Wife or Heir of the Dead, may have an Appeal before the Conſtable and Marſhal, whoſe Sentence is upon the Teſtimony of Witneſſes, or Combat. *Ibid.* 74. So if a Man be Martial Affairs. Witneſſes, or Combat.

be wounded in *France*, and die thereof in *England*. *Ibid.* 4 *Inſt.* 140.

What Iſſue ſhall be firſt tried.

It is worthy our Obſervation, to take Notice, when there are ſeveral Iſſues, which of them ſhall be firſt tried; and for this you have already heard, That where Iſſue is joined for Part, and a Demurrer for the Reſidue, the Court may direct the Trial of the Iſſue, or judge the Demurrer

Latch 4.

firſt, at their Pleaſure; though by the Opinion of *Dodderidge*, it is the beſt way to give Judgment upon the Demurrer firſt, becauſe when the Iſſue comes afterwards to be tried, the *Jury* may

Damages.

aſſeſs Damages for the whole.

A *Scire facias* was brought upon a *Recognizance* in *Chancery*, *the Ter-tenants* pleaded ſeveral Pleas, the Plaintiff demurred to one, and took Iſſue on the other, the Record was ſent into *B. R.* to try the Iſſue, and it was tried, and *Verdict pro Plaintiff*, the Demurrer not being argued; and it was adjudged *per B. R.* that Judgment ought to be given on both by that

2 Keb. 621.

Court. *Jeffreyſon* and *Dawſon*'s Caſe, *Hill.* 21, 22 *Car.* 2. *B. R.* *Vide* for theſe Things, 1 *Rol. Abr.* 534, 535. *Rol. Rep.* 287. and in the principal Caſe, 4 *Inſt.* 80. was denied to be Law.

Immaterial Iſſue.

An immaterial Iſſue joined, which will not bring the Matter in Queſtion to be tried, is not helped after Verdict by the Statute of *Jeofails*, but there muſt be a Repleader; becauſe this is a Matter of Subſtance; for if there were no Iſſue, there could be no Verdict, and ſo it is as if nothing had been done in the Cauſe.

Plea to the Writ.

In an Action againſt two, the one pleads in Abatement of the Writ, the other to the Action, the Plea to the Writ ſhall be firſt tried; for

for if that be found, all the whole Writ ſhall abate, and make an End of the Buſineſs; for the Plaintiff ought not to recover upon a falſe Writ. 1 *Inſt.* 125. *b.*

In a Plea Perſonal againſt divers Defendants, the one Defendant pleads in Bar to Parcel, or which extendeth only to him that pleadeth it; and the other pleads a Plea which goeth to the whole: The Plea that goeth to the whole (that is) to both Defendants ſhall be firſt tried, becauſe the other Defendant ſhall have Advantage thereof; for in a Perſonal Action, the Diſcharge of one is the Diſcharge of both. Plea to the whole firſt tried.

As for Example; If one of the Defendants in Treſpaſs pleads a Releaſe to himſelf (which in Law extends to both), and the other pleads Not guilty (which extends but to himſelf;) or if one pleads a Plea which excuſeth himſelf only, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole ſhall be firſt tried; for if that be found, it maketh an end of all: And the other Defendant ſhall take Advantage hereof, becauſe the Diſcharge of one is the Diſcharge of both. But in a Plea real it is otherwiſe, for every Tenant may loſe his Part of the Land; as if a *Præcipe* be brought as Heir to his Father againſt two, and one pleads a Plea which extendeth but to himſelf, and the other pleads a Plea which extends to both, as Baſtardy in the Demandant, and it is found for him, yet the other Iſſue ſhall be tried; for he ſhall not take Advantage of the Plea of the other, becauſe one Jointenant may loſe his Part by his Miſplea. 1 *Inſt.* 125. *b.* Releaſe. Rol. *Tit.* Trial, 628. Diſcharge of one diſchargeth both.

Brown and *Staundford*, Juſtices, conſulted with Grammarians in Things of Grammar; and *Hulls*

a Ba-

a Bachelor of Law (*tempore H. 6.*) was called into Court to ſhew the Difference between preciſe and cauſative Compulſion. *Vide Plow.* 122, 127, 128.

Paſch. 16 *Car.* 2. *B. R.* An Action of *Trover*, *&c.* was brought *de ſex Capitalibus fibulatis*, *Anglice*, ſix laced Coifs; after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the *Latin* Words were both Adjective, and ſo not certain: But it was anſwered, That *Capital* is a Subſtantive, and the *Nomenclator* of *Weſtminſter-School* was produced to warrant it; and it was adjudged for the Plaintiff accordingly; and the Court allowed that Authority before *Rider's Dictionary*.

Chriſtian Name amended.

Henley and *Burſtal*; In the pleading and joining of the Iſſue, the Defendant's Chriſtian Name was miſtaken; and reſolved by the Court, that it might be amended, it being right before in the Record. 1 *Ventr.* 25.

New Trial directed by the Court of *Chancery* in *Replevin*.

A Bill was exhibited in *Chancery*, complaining that a Verdict in *Replevin* had been unduly obtain'd; and it was decreed that there ſhould be a new Trial, the Complainant paying the Coſts of the former: This could not have been tried again at Law, becauſe the Verdict in *Replevin* is concluſive. 2 *Vent.* 35.

Juror producing a Court-Roll to his Companions, Cauſe for a new Trial.

Goodman verſus *Cotherington*; the Jury being charged with an Iſſue, and departed from the Bar, one of them went from his Companions and fetched a Court-Roll, which induced the Jury to find for the Plaintiff; and it was held to be a good Cauſe for a new Trial: But *Twiſden* ſaid, that in Caſe of ſuch a Miſcarriage in *Pais*, no Notice ſhould be taken of it on Affidavits, unleſs it were indorſed on the *Poſtea*. 1 *Siderfin* 235.

Throg-

Throgmorton's Case; where an Issue is joined and a Year passes, the Plaintiff cannot bring the Cause to Trial without giving a Term's Notice. *Per Cur.* If Notice were given the Term before, and they did not proceed that Term, but the next, then fourteen Days Notice is sufficient; and if after a Year is lapsed, the Defendant will try the Issue by Proviso, a Term's Notice is not necessary, for that the Plaintiff ought to be at all Times ready to try it. 1 *Siderfin* 34.

A Term's Notice required, where the Cause has been a Year at Issue.

Not so where the Defendant tries it by Proviso.

Sir *Hugh Povey*'s Case; the Court held, That since the Defendant, by his Privilege of Parliament, had delayed the Plaintiff above a Year after Issue joined, the Plaintiff should not be obliged to give him a Term's Notice of Trial, any more than where a Defendant stays the Proceedings by an Injunction obtained out of *Chancery*. *Ibid.* 92.

Need not give a Term's Notice where the Defendant occasions the Delay by his Privilege, *&c.*

A full Term's Notice exclusive is necessary, but Notice of Trial at any Time within the Year, though afterwards countermanded, is a sufficient Proceeding to bring the Plaintiff out of the Rule.

Where Proceedings had staid twelve Months, and afterwards a Trial, the Verdict was set aside, because Notice of Trial was not given before the Essoin Day of the Term preceding the Trial. This was in *C. B.*

Pas. 13 *G.* 2. *C. B.* was a Rule made to explain the Rule for giving a Term's Notice, *and Ordered*, that in all Cases where no Proceedings have been in four Terms exclusive of the last proceding, the Party who desires to proceed shall give a Term's Notice, and before the Essoin Day of the fifth or other subsequent Term, and that a Judge's Summons, if no Order be

made thereupon, ſhall not be deem'd a Proceeding, but that a Notice of a Trial, though afterwards countermanded, ſhall be deemed a Proceeding.

Notice for a Priſoner left with a Turnkey eight Days before the Trial, ſufficient.

Rex verſus *Baron*; it was held, That Notice of Trial left with a Turnkey of the *Marſhalſea*, eight Days before the Trial, was good Notice, as well in Criminal Caſes as Civil. *Sid.* 231.

Defendant in Indictment of Perjury, may try it by Proviſo.

Where Iſſue is joined upon an Indictment of Perjury, and the Proſecutor does not try it, the Party indicted may try it by Proviſo. 1 *Sid.* 317.

Where a new Trial may be granted, and where not.

Read verſus *Dawſon*; in an Information of Perjury, it was found for the King, and moved upon ſeveral Affidavits to have a new Trial. The Court were of Opinion, That they had not Power to grant a new Trial, without Conſent of the Counſel for the King, although to them there appeared ſufficient Cauſe for a new Trial: But they agreed, That in Debt by an Informer, the Court might grant a new Trial upon Cauſe ſhewn, without Conſent of the Counſel, becauſe there the Party had Intereſt. 1 *Sid.* 49.

Wheeler verſus *Honour*; it was there held, That a new Trial ought not to be granted after a Trial at Bar, but upon great Cauſe; and it was ſaid, There were not above two Inſtances to be met with, where a new Trial had been granted upon a Motion after a Trial at Bar. *Sid.* 58.

Fact mixed with Matter of Record, to be tried *per Pais*.

If Matter of Fact and Matter of Record are ſo intermixed that they cannot be divided, the whole ſhall be tried by the Country. *Sid.* 314.

Avoidance and Plenarty, how to be tried.

Watſon verſus *Baker*; If an Iſſue be, whether a Church be void or not void, this ſhall be tried by

by the Country; but if the Iſſue be whether the Church is full or not full, it ſhall be tried by Certificate: So if the Iſſue be, whether ſuch a Feme be Covert or Sole, this ſhall be tried by the Country; but if *unque accouple in loyal Matrimony*, it ſhall be tried by Certificate. And the Reaſon of thoſe Caſes is, That void or not void, Covert or Sole, are Things notorious to the Country, and diſtinguiſhable, by them; but Plenarty or Loyal Matrimony are not within their Conuſance, and therefore not triable by them; for Plenarty is by Inſtitution, and Loyal Matrimony ought to be agreeable to the Laws eſtabliſhed in that Caſe, of which the Country are not Judges. *Sid.* 390.

Covert or Sole *per Pais*.

Loyal Matrimony *per* Certificate.

The Reaſon.

Able or not able in *Quare Impedit*, if the Clerk refuſed be living, ſhall be tried *by the ordinary*, for the Clerk is to be examined; but if the Clerk be dead, *per Pais*, for he cannot then be examined.

So, whether the Church be void by Deprivation, it ſhall be tried by the *Ordinary*; but if the Voidance be alledg'd to be *by Death*, it ſhall be tried *per Pais*.

Inſtitution ſhall be tried by the Ordinary, for it is Spiritual; but *Induction* or *Inſtallation*, *per Pais*: And ſo it is, if the Iſſue be upon Inſtitution and Induction, for the Common Law ſhall be preferred. *Vin. Trial*, 40.

A *Divorce* ſhall be tried by the Ordinary, and not *per Pais*; ſo ſhall *general Baſtardy*; but *ſpecial Baſtardy per Pais*.

If Iſſue be join'd *Marriage or no Marriage*, it ſhall be tried by Certificate of the Biſhop; but if the Queſtion be, Whether the Party was married *to another or not?* the temporal Court ſhall

judge of the Matter without Certificate. *Ibid.* 47.

Nient letter'd in *Quare Impedit* againſt the Ordinary, ſhall be tried by the Metropolitan, for the Ordinary is intereſted; but if the Metropolitan be dead, and the See void, it ſhall be tried by the Guardians of the Spiritualties. *Ibid.* 49.

The Biſhop of *Durham* has temporal Juriſdiction, and writes to his Clerks to certify Baſtardy, *&c.*

Whether a Biſhop be *conſecrated* or not? ſhall be tried by the Metropolitan, who ſhall certify the *Year and Day* of the Conſecration, from which Day the Temporalties ſhall be delivered to him. *Apud eundem* 53.

Pais. Of Trials *per Pais* it is not to be doubted (ſaith *Dugdale*) but that the moſt antient Form of Trials in *Civil* Caſes as well as *Criminal* was by a certain Number of Men ſworn, who upon Teſtimony given of the Fact were to judge and determine.

Intent prohibited may be tried *per Pais*; and though the beſt Trial of an Intention is by the Act intended when done; yet this Intent may be tried by other Circumſtances and Evidences of the Fact, beſides the bare doing of the Fact; as in the Caſes of thoſe Acts which *prohibit* the Importation of foreign Coin, or of the taking of Wooll, Gold, Silver, *&c. with intent* to utter or tranſport, the *Intent* join'd with the Act ſhall be tried by ſuch Circumſtances which evidence the Intent, for Intention and Knowledge lie in Averment and Proof; but generally ſpeaking, *Intention* where it is not prohibited is not triable, as that a Man did ſuch a particular Thing *eâ Intentione* to do it, this is not triable; indeed

indeed, ſometimes upon *another Fact* put in Iſſue, the Jury ſhall try the Intent collaterally, as in Murder. *Vin. Trial*, 69, 70.

The *Boundaries* of a Pariſh is triable *per Pais*, and in all Caſes where the Matter to be tried is in the Diſcretion of the Juſtices, they may ſend it to the Country.

Sealing and Delivery of a Deed is triable by Jury; but whether a man be *conſiliarius & in lege eruditus* is not triable by Jury. So whether Land be *reputed* parcel of a Manor, this ſhall not be tried *per Pais*, for it is too uncertain, and may be ſo reputed by ſome and not by others, or only for a ſhort Time. The *Courſe* of the Court cannot be tried by Jury, for it is Matter of Law; nor can the general Cuſtom of *England* in charging a Carrier or Innkeeper for Goods neglected or ſtolen; but where an act of parliament makes an Offence, and is ſilent in the Manner of Trial, it ſhall be intended *per Pais*. *Ibid.* 71.

Breach of Covenant aſſigned in another County, Miſ-trial.

Gilbert verſus *Martin*; an Action of Covenant was brought in *Hampſhire*, and a Breach aſſigned for not repairing a Houſe in *Berkſhire*, and Iſſue joined upon *non infregit Conventionem*. And a Verdict for the Plaintiff in *Hampſhire*: Mov'd in Arreſt of Judgment, that this was a Miſ-trial; and of that Opinion was the Court. *Sid.* 157.

View after the Jury appear.

Bulſtrode verſus *Hall* and *Stevens*; the View was granted in a Trial at Bar, after the Jury had appeared and heard Part of the Evidence. *Sid.* 148.

No new Trial after Acquittal.

Rex verſus *Davis & al.* An Information for an Aſſault and Riot was tried at the Aſſizes for *Devon*, and a Verdict for the Defendants that they were not guilty. And on a Motion

for a new Trial upon Affidavits of the Fact, and that the Judge's Directions were to find the Aſſault, it was denied; for the court ſaid, there could be no Precedent ſhewn for it in caſe of Acquittal. *Shower* 336.

Trial by two Witneſſes.

Where a Trial is not by Jury, but *per Teſtes*, there muſt be two in all Caſes. *Shower* 361.

Rex verſus *Bear*, *Hill.* 10 *W.* 3. *B. R.* Indictment for Compoſing, Writing, Making and Collecting ſeveral Libels; reſolv'd that the whole Libel need not be ſet forth in the Indictment; but if any Part qualifies the reſt, it may be given in Evidence. *Salkeld* 417.

If a Libel be publickly known, having a written Copy of it is an Evidence of a Publication; but otherwiſe, where it is not known to be publiſhed. *Ibid.*

Death of Defendant before the Commiſſion-Day, not aided by the Statute; but if after Commiſſion-Day, it is aided.

Mich. 6 *Ann. B. R.* Ejectment laid in *Devonſhire*, to be tried at *Exeter*, the Defendant died the Day before the Aſſizes began at *Exeter*; and upon a trial on full Evidence, Verdict *pro Quer.* and Motion in Arreſt of Judgment. *Et per Cur.* Firſt, the death of either Party before the Aſſizes is not remedied by the Statute; but if the Party dies after the Aſſizes begins, though the Trial be after his Death, that is within the Remedy of the Statute; for the Aſſizes is but one day in law, and this is a Remedial Law, and ſhall be conſtrued favourably. 2. The Court held, That in this Caſe it was in their Diſcretion, whether they would upon Motion arreſt Judgment, or put the Party to a Writ of Error; accordingly they refuſed to arreſt the Judgment, and the party was put to his Writ of Error, that the Point might be put in Iſſue and tried by a Jury. 1 *Salkeld* 8.

Duke's

Duke's Caſe, *Mich.* 9 *W.* 3. *B. R. Duke* was upon a Trial at Bar convicted of Perjury, and upon the *Capias* he was outlawed; and upon the Exigent it was moved, That judgment of the Pillory might be given againſt him in his abſence. *Et per Holt* Ch. J. Judgment cannot be given againſt any Man in his Abſence for a corporal Puniſhment; there is no ſuch Precedent. If a man be outlawed of Felony, Execution was never awarded againſt the Felon till brought to the Bar. A *Capias ad Satisfaciendum Domino Regi pro fine*, is common, but there never was a Writ to take a Man and put him in the Pillory; and ſo ſaid Sir *Samuel Aſtry* upon ſearch of Precedents. 1 *Salkeld* 400.

Judgment for a corporal Puniſhment cannot be given againſt one in his Abſence.

Duke of *Norfolk*'s Caſe, *Trin.* 1 *Ann. B. R.* A Verdict was given in *Eaſter* Term, and before Judgment ſigned the Plaintiff died. *Et per Holt*, Ch. J. That ſhall not hinder the Judgment being enter'd, provided it be within two Terms after; and the Statute of Frauds and Perjuries only requires the Time of Signing ſhould be enter'd upon the Roll; and this is only for the Benefit of Purchaſers; for if Judgment be ſigned in the Vacation, yet 'tis enter'd as of a Term before, and none but a Purchaſer ſhall be admitted to ſay, it was ſigned as of any other Time; and it is the Courſe of the Court, to let all Things be done in the Vacation, as of the Term before. 1 *Salkeld* 401.

Judgment may be after Plaintiff's Death, provided it be within two Terms after Verdict.

By the 8 & 9 *W.* 3. *cap.* 11. *Intitled an Act for the better preventing frivolous and vexatious Suits*, it was enacted, 'That where ſeveral Perſons ſhall be made Defendants to any 'Action of Treſpaſs, Aſſault, Falſe Impri-'ſonment,

Full Coſts in Treſpaſs, &c. to every Defendant acquitted upon Trial.

ſonment, or *Ejectione firmæ*, and any one or more ſhall upon Trial be acquitted by Verdict; every Perſon ſo acquitted ſhall recover his Coſts of Suit, unleſs the judge ſhall immediately after the Trial in open Court, certify upon the Record that there was a reaſonable Cauſe, for making ſuch Perſon or Perſons a Defendant or Defendants to ſuch Action.

Unleſs the Judge certify.

Coſts upon a Demurrer.

And that if any Perſon ſhall commence in any Court of Record any Action or Suit, wherein upon demurrer Judgment ſhall be given againſt the Plaintiff or Defendant; or if at any Time after Judgment given for the Defendant, the Plaintiff ſhall ſue a Writ of Error, and the ſaid Judgment ſhall be affirmed, or the ſaid Writ diſcontinued, or the Plaintiff nonſuit therein, the defendant ſhall have Judgment to recover his Coſts againſt ſuch Plaintiff, and Execution by *Capias ad ſatisfaciendum*, *Fieri facias* or *Elegit*.

Coſts on a Writ of Error.

Coſts in Debt for not ſetting out Tithes.

That in all Actions of Waſte and Debt, upon the Statute for not ſetting forth of Tithes, where the Damage found by the Jury ſhall not exceed twenty Nobles; and in all Suits upon writs of *Scire facias*: And upon Prohibitions, the Plaintiff obtaining Judgment, or Award of Execution after Plea pleaded, or Demurrer joined therein, ſhall likewiſe recover his Coſts of Suit; and if the Plaintiff become nonſuit or diſcontinue, or a Verdict paſs againſt him, the Defendant ſhall have Coſts and Execution for the ſame.

Wilful Treſpaſs, full Coſts.

That in all Actions of Treſpaſs commenc'd in any Court of Record, where it ſhall appear at the Trial, and be certified by the

Judge

' Judge on the back of the Record, That the ' Treſpaſs was wilful and malicious, the Plain- ' tiff ſhall recover not only his Damages, but ' full Coſts of Suit.

' Provided nothing herein contained ſhall al- ' ter the laws in Being, as to Executors and ' Adminiſtrators, in ſuch Caſes where they are ' not at preſent liable to pay Coſts of Suit.

Not extended to executors, and Adminiſtrators.

' That in all Actions to be commenced in ' any Court of Record, if the Plaintiff die af- ' ter any interlocutory Judgment, and before a ' final Judgment, the ſaid Action ſhall not a- ' bate, if the ſaid Action might be originally ' proſecuted by his Executors or Adminiſtra- ' tors; and if the Defendant die after ſuch in- ' terlocutory Judgment, and before a final ' Judgment, the Action ſhall not abate, if ſuch ' Action might be originally proſecuted againſt ' his Executors or Adminiſtrators; and the ' Executors or Adminiſtrators of ſuch Plaintiff, ' after ſuch interlocutory Judgment, may have ' a *Scire facias* againſt the Defendant if li- ' ving; or if dead, againſt his Executors or ' Adminiſtrators, to ſhew Cauſe why Dama- ' ges ſhould not be aſſeſſed and recovered a- ' gainſt him or them; and if he or they do ' not appear at the Return, and ſhew ſuffici- ' ent Cauſe to arreſt the final Judgment, or ' being returned warned, or upon two Writs ' of *Scire facias*, it being returned that the ' Defendant had nothing whereby to be ſum- ' moned, or could not be found; a Writ of ' Inquiry of Damages ſhall be awarded, which ' being executed and returned, Judgment final ' ſhall be given for the Plaintiff, his Executors ' or Adminiſtrators.

Plaintiff or Defendant dying after an interlocutory Judgment, and before a final Judgment, the Action ſhall not abate.

Death of one of the Plaintiffs or defendants, where is more than one, ſhall not abate the Action.

'If there be two or more Plaintiffs or Defendants, and one die, if the Cauſe of Action ſurvive to the ſurviving Plaintiff, or againſt the ſurviving Defendant, the Writ or Action ſhall not abate; but ſuch Death being ſuggeſted upon the Record, the Action ſhall proceed.

Plaintiff in Debt on Bond, *&c.* for Non-performance of Covenants, to aſſign as many Breaches as he thinks fit.

'That in all Actions proſecuted in any Court of Record, upon any Bond or penal Sum for Non-performance of Covenants, the Plaintiff may aſſign as many Breaches as he ſhall think fit; and the Jury at the Trial ſhall and may aſſeſs Damages for ſuch of the ſaid Breaches ſo aſſigned, as the Plaintiff at the Trial ſhall prove broken, and the like Judgment ſhall be entered on ſuch Verdict as hath been uſually done in ſuch Actions.

And the Jury may aſſeſs Damages accordingly.

'And if Judgment be given for the Plaintiff, upon Demurrer, Confeſſion or *nihil dicit*, the Plaintiff upon the Roll may ſuggeſt as many Breaches as he ſhall think fit, upon which ſhall iſſue a Writ to ſummon a Jury to appear at the Aſſizes of that reſpective County, to inquire of the Truth of every one of thoſe Breaches, and to aſſeſs Damages accordingly: And the Juſtices of Aſſize ſhall make Return thereof to the court from whence the ſame iſſued: In Caſe the Defendant after ſuch Judgment entered, and before ſuch Execution executed, ſhall pay into Court ſuch Damages ſo aſſeſſed, and Coſts of Suit, a Stay of Execution ſhall be entered of Record; or if by reaſon of Execution executed, the Plaintiff or his Executors or Adminiſtrators ſhall be fully paid all ſuch Damages, together with his Coſts and reaſonable Charges, the Body, Lands, and

Defendant paying Damages and Coſts aſſeſſed, Execution to be ſtay'd.

'Goods

'Goods of the Defendant shall be forthwith 'discharged, and the Satisfaction entered upon 'Record: Yet shall such Judgment stand and 'be as a further Security to answer the Plain- 'tiff, his Executors, *&c.* such Damages as 'shall or may be sustained, for farther Breach 'of any Covenant in the same Deed or Wri- 'ting contained, upon which the Plaintiff, '*&c.* may have a *Scire Facias* upon the said 'Judgment against the Defendant, his Heir, 'Ter-tenants, Executors, or Administrators, 'suggesting other Breaches, and to summon 'them to shew Cause, why Execution shall not 'be awarded upon the said Judgment; upon 'which there shall be the like Proceedings as 'aforesaid: And upon Payment of Damages 'and Costs, Proceedings to be again stay'd, 'and so *toties quoties*, and the Defendant dis- 'charged out of Execution.'

But the Judgment to stand as a Security against farther Breaches.

Whereupon the Plaintiff may have a *Scire facias.*

By 4 *&* 5 *Ann. c.* 16. intitled, *An Act for the Amendment of the Law, and the better Advancement of Justice*, it was enacted, 'That 'upon Demurrer joined in any Court of Re- 'cord, the Judges shall give Judgment as the 'Right and Matter in Law shall appear, with- 'out regarding any Imperfection or Defect in 'any Writ, Return, Pleading, or Process, ex- 'cept those which the Party demurring shall 'set down as Causes of his Demurrer, notwith- 'standing such Imperfection or Defect have 'been taken to be Matter of Substance, and 'not aided by 27 *Eliz. c.* 5. so as sufficient 'Matter may appear, upon which the Court 'may give Judgment. And no Exception 'shall be taken for an immaterial Traverse, 'Default of entring Pledges, upon Bill or De- 'claration, or not alledging the bringing into 'Court

On demurrer no Imperfections to be regarded, but such as are set down as Causes of Demurrer.

‘ Court any Deed mentioned in the Pleading, ‘ Letters Teſtamentary, or of Adminiſtration, ‘ or for Omiſſion of *Vi & armis & contra Pacem*, or either of them, or *hoc parat. eſt verificare*, or *parat. eſt verificare per Recordum*, ‘ or *prout patet per Recordum:* But the Court ‘ ſhall give Judgment without regarding ſuch ‘ Imperfections or Defects, or other Matter of ‘ like Nature, except ſhewed for Cauſe.

In *Replevin* ſeveral Matters may be pleaded with Leave of the Court.

‘ That the Defendant or Tenant, or Plaintiff in *Replevin*, in any Court of Record, with ‘ Leave may plead as many ſeveral Matters as ‘ are neceſſary. [*And it is upon the Equity of this Clauſe, that the Courts do now in general allow the Defendant in moſt Actions by Rule to plead as many ſeveral Pleas as he ſhall be adviſed.*]

If ſuch Matter be inſufficient, full Coſts.

‘ Proviſo, If any ſuch Matter on Demurrer ‘ be judged inſufficient, Coſts ſhall be given at ‘ the Diſcretion of the Court: Or if a Verdict be found on any ſuch Iſſue for the Plaintiff or Demandant, Coſts ſhall be given in like ‘ Manner; unleſs the Judge certify that the ‘ Defendant, Tenant, or Plaintiff in *Replevin* ‘ had a probable Cauſe to plead it.

No dilatory Plea to be received.

‘ That no dilatory Plea ſhall be received in ‘ any Court of Record, unleſs the Truth thereof be proved by *Affidavit*, or ſome probable ‘ Matter ſhewn.

Where Payment may be pleaded in Debt. Condition of a Bond ſatiſfied, Payment may be pleaded.

‘ In Debt on a ſingle Bill, Debt, or *Scire facias* upon a Judgment, the Defendant may ‘ plead Payment in Bar. In Debt upon a ‘ Bond, if the Defendant before Action ‘ brought, hath paid the principal and Intereſt due by the Defeaſance or Condition, he ‘ may plead Payment in Bar.

'Pending an Action on ſuch Bond, Defend-
'ant may bring in Principal, Intereſt and
'Coſts in Law and Equity, and then the
'Court ſhall give Judgment to diſcharge the
'Defendant.

Defendant diſcharged on bringing in Principal, Intereſt, and Coſts.

Lazier verſus *Dyer*, *Mich.* 2 *A. B. R.* Iſſue being joined and entered as of *Trinity* Term, the Plaintiff reſted till the *Trinity* Term following, and then gave notice of Trial after the Term; and a *Venire facias* and *Diſtringas* was taken out in the Vacation, but teſted and entered as of the Term. *Per Cur':* This is not ſufficient Notice; for though in Law this was a Proceeding within the Term; yet in Fact it was a Proceeding in Vacation, and therefore there was not a Term's Notice of Trial. 2 *Salk.* 457.

If there be no Proceeding *in Fact*, within four Terms, there muſt be a Term's Notice of Trial.

In all Caſes in which there have been no Proceedings for four Terms, excluſive of the Term in which the laſt Proceeding was had, the Party who deſires to proceed again, ſhall give a Term's Notice to the other of ſuch Proceeding; ſuch Notice to be given before the Eſſoin Day of the Fifth or other ſubſequent Term; a Judge's Summons, if no Order be made thereupon, ſhall not be deemed a Proceeding, but a Notice of Trial, though afterwards countermanded ſhall. Rule *Eaſter*, 13 *Geo.* 2. And

Verdict ſet aſide for want of a Term's Notice, there having been no Proceedings for a Year, purſuant to the above Rule. *Mich.* 17 *Geo.* 2. *Blackmore* v. *Smith.* 2 *Barnes*'s Notes 242.—This does not extend to Motions to *end* Proceedings. *Ibid.* 244.

Said *per Cur.* That the King ſhall pay Coſts for an Amendment, but ſhall not pay Coſts for not going on to Trial: But where there is a Proſecutor,

Crown pays Coſts for Amendments, but not for not going on to Trial.

Proſecutor, he ſhall pay Coſts for Amendments, and for not going on to Trial both. *Hil.* 8 *W.* 3. *The King* v. *Edwards. B. R.* But then there muſt be an *Affidavit* of the Name of him who is the Proſecutor, for that does not appear upon the Indictment: And if the Defendant does not know the Proſecutor, he ought to apply to the Attorney General, who will inform him. *Salk.* 193.

If a Cauſe has continued *four* Terms without Proſecution after Iſſue joined, there muſt be a Term's Notice of Trial, ſuch Notice to be given before the Eſſoin-Day of the Fifth, or other ſubſequent Term. A Judge's Summons, if no Order made, is no Proceeding; but a Notice of Trial though countermanded, is. *Harriſon's Pract. B. R.* 137. *Str.* 211, 1164.

The Court, on Motion for a new Trial, held, that the giving Notice of Trial, at the End of half a Year after Iſſue joined, would prevent the Neceſſity of giving a Term's Notice, till a Year after the laſt Notice, which was given and countermanded. *Str.* 531.

Demurrer to Part, and Iſſue to other Part.

Anonymus, *Mich.* 13 *W.* 3. *B. R.* If there be a Demurrer to Part, and an Iſſue upon the other Part, and Judgment be given for the Plaintiff upon the Demurrer, he may enter a *Non Proſ.* as to the Iſſue, and proceed to a Writ of Inquiry on the Demurrer; but without a *Non Proſ.* he cannot have a Writ of Inquiry, becauſe on the Trial of the Iſſue, the ſame Jury will aſcertain the Damages for that Part to which the Demurrer was. *Per Cur'. Salk.* 219.

Where a new Trial will not be granted.

Watſon verſus *Sutton*; a new Trial will not be granted for Matter omitted to be inſiſted on at a former Trial. *Salk.* 273.

Cur. declared, That it was againſt the Rule of Court to grant a Trial at Bar in any Caſe before Iſſue is joined, and accordingly it was refuſed in this Caſe, becauſe Iſſue was not joined, though both Sides conſented; for till the Court knows what the Iſſue is, it is below their Dignity to direct it to be tried at Bar, for it may be an Iſſue in which there may be no manner of Difficulty. *Eaſter*, 12 *Geo.* 1. The Caſe of the Borough of *Chriſt-Church* in *B. R. M. S.* Rep. *Eaſter*, 4 *Geo.* 2. *Butler* Executor v. Lord *Montgomery*, S. P. *Ibid.* —— No Trial at Bar can be the Term it is prayed. *Ibid.*

No Trial at Bar before Iſſue joined; nor the Term it is prayed.

Trials at Bar are grantable either upon the Value of the Lands or Difficulty of the Title. *M.* 4 *Geo.* 2. *Haycroft* v. *Roſe*, *MS. Rep.*

For putting off Trials for want of Witneſſes, it is neceſſary to ſwear that the Party is adviſed, and believes the Perſons abſent are material Witneſſes, and that he cannot ſafely proceed to Trial without their Evidence, and alſo to add when they are expected.

CHAP. III.

Of a Venire facias; *to whom it ſhall be directed; when to the Sheriff, when to the Coroners, when to Eſliſors, and when to Bailiffs, when well awarded,* &c.

HAVING given you the Epitome of what Trials are allowed by the Common Law, and what ſhall be tried *per Pais*, and what not, we ſhall now apply ourſelves more particularly to the Trial by Juries: And becauſe a *Venire facias*

facias is the Foundation and *Cauſa ſine qua non* of a Jury, (I mean in Civil Cauſes;) for in Criminal, as upon Indictments, the Juſtices of Gaol-Delivery give a general Command to the Sheriff, to cauſe the Country to come againſt their Coming, and take the Panels of the Sheriff, without any Proceſs directed to him; yet Proceſs may be made againſt the Jury, though it is not much uſed. *Staunford Pleas del Corone* 155. I will firſt recite the Writ *in terminis*, the rather becauſe I intend to order my Diſcourſe according to the Method of the Writ.

Venire facias. *Rex, &c. Vic.* B. *Salutem. Præcipimus tibi quod venire facias coram Juſticiariis noſtris de Banco apud Weſtm. tali die duodecim liberos & legales homines de vicinet. de* C. *quorum quilibet habeat quatuor libras terræ, tenement. vel reddit' per annum ad minus, per quos rei veritas melius ſciri poterit; & qui nec* D. E. *nec* F. G. *aliqua affinitate attingunt, ad faciend. quandam Jur. patriæ inter partes prædict. de placito, &c. quia tam idem* D. *quam prædict.* F. *inter quos inde contentio eſt, poſuer. ſe in Jur' illam. Et habeas ibi nomina Jur. illorum & hoc breve.* Teſte, *&c.*

This is one of thoſe *Latin* Letters, (as *Finch* terms them, *f.* 237.) which the King ſends with Salutation to the Sheriff; but withal commands him, That he cauſe to come twelve free and lawful Men of his County, to reſolve the Queſtion of the Fact in Diſpute between the Parties upon the Iſſue; and it is a Judicial Writ, iſſuing out of the Record, for Plaintiff or Defendant, after they have put themſelves upon the Country: For upon the Words *Et de hoc ponit ſe ſuper patriam*, by the Defendant, or

Et

Et hoc petit quod inquiratur per patriam, by the Plaintiff, and Issue joined thereupon, the Court awardeth the *Venire facias*, viz. *Ideo fiat inde Jurat.*'

When Issue is joined in Chancery, that Court awards the *Venire* to be returnable in *B. R.* and there is no other Way to give a Day here in *B. R.* but by such an Award; and it is always so done. *Vin. Trial*, 295.

Ideo venit inde Jurat. is Error in inferior Courts, for it ought to be *Ideo Præcept. est vic. quod ven. fac'*, *&c. Siderfin* 364. and it should be *de visneto de* C. specially. *Keble* 2 Part, 350.

And if they come not at the Day of the Writ returned, then shall go forth against them an *Habeas Corpora* and *Distringas* to bring them in to try the Matter. The which two last Writs are usually made with this Clause, *Nisi prius Justiciarii venerint*, *&c.* and are returnable after the Time of the Judges coming their Circuit.

And first, you see it is directed *Vicecomiti*, *i. e.* to one who is *Vicecomes*, and hath the Regimen of the County instead of the Earl of that County, to whom once it did belong; as we are taught in the *Mirror*, *cap.* 1. *sect.* 3. *scil.* 'That it appeareth by the Ordinance of ancient 'Kings before the Conquest, that the Earls of 'the Counties had the Custody or Guard of the 'Counties. And when the Earls left their Cu-'stody or Guards, then was the Custody of 'Counties committed to Viscounts, who there-'fore are called *Vicecomites*.' Sheriff. 1 Inst. 168.

What great Repose and Trust both the King and Laws put in this great Officer, the Oracle tells you, 1 *Inst.* 168. That he is Sheriff, that is, *Præfectus Comitatûs*, Governor of the County; What Trust in the Sheriff.

ty; for the Words of his Patent be, *Commiſimus vobis Cuſtodiam Comitatûs noſtri de, &c.* And he had a threefold Cuſtody, *triplicem Cuſtodiam, viz.* Firſt, *Vitæ Juſtitiæ*; for no Suit begins, and no Proceſs is ſerved but by the Sheriff. *And he is to return indifferent Juries for the Trial of Mens Lives, Liberties, Lands, Goods, &c.* Secondly, *Vitæ Legis*, he is after long Suits and chargeable, to make Execution, which is the Life and Soul of the Law. Thirdly, *Vitæ Reipublicæ*, he is *Principalis Conſervator Pacis* within the County, which is the Life of the Commonwealth, for *Vita Reipublicæ Pax.*

To whom the *Venire facias* ought to be directed.

Yet notwithſtanding the Height and Latitude of this great Officer's Power and Truſt, the Law adjudges him in many Caſes not capable to do ſo much as return a Jury; for if he be of Kindred by Nature, or of Affinity by Marriage, to any of the Parties, or (that I may ſay all in a little) if he be not as indifferent almoſt in all Reſpects, as he is whom the Law allows to be a Juror, he ought not to meddle with the returning of the Jury; but the *Venire facias* ſhall be directed to the Coroners (or to ſome of them, if the Reſidue are not indifferent) who in that Caſe are *hac vice Vicecom.* And if the Coroners are not indifferent, then the *Venire* ſhall be directed *ad 2 Electores*, that is, to two whom the Court ſhall chuſe and deem fit to return the Jury; and to the Return of theſe *Eliſors* or *Eſliſors*, *ab Eligendo*, no Challenge will be admitted, *Bro.* Tit. *Venire facias*, 14. as to the Array, but to the Polls, 1 *Inſt.* 158. If one of the Sheriffs of *London* be a Party, then the *Venire* may be directed to the other Sheriff; if the Under-Sheriff be a Party, yet the *Venire* may be directed to the Sheriff,

Coroners.

Forteſcue, cap. 2. 5.

Eſliſors.

Challenge.

Sheriff of *London.*

Of *London* or of any Place, where two Perſons make one Sheriff.

Sheriff, with this Proviſo, *Quod Sub-Vic. tuus in nullo ſe intromittat cum executione iſtius brevis.* 18 *E.* 4. 3.

Judicial Writs may be directed to the Coroners, as the *Venire facias*, where the Parties are at Iſſue; there, upon the Surmiſe of the Plaintiff, that the Sheriff is his Couſin, and upon Prayer that the *Venire* be directed to the Coroners, for Avoidance of his own Delay that might happen by the Challenge of the Array, the Defendant ſhall be examined, whether it be true or not; and if he confeſſes it, then the *Venire* ſhall be awarded to the Coroners; for then it appears to the Court by the Defendant's Confeſſion, that the Sheriff is not indifferent; but if the Defendant denies it, then the Proceſs ſhall be awarded to the Sheriff becauſe the Sheriff's Authority and Profit ſhall not be taken away, without Cauſe apparent to the Court; and the Defendant ſhall never take any Challenge for that Caſe: But if the Defendant will alledge any ſuch Matter, and pray a *Venire facias* to the Coroners, there the Plaintiff ſhall not be examined; neither ſhall ſuch Allegations be allowed, becauſe Delays are for the Defendant's Advantage, and the Defendant may challenge the Jury for this Cauſe, and ſo is at no Prejudice.

Suggeſtion. 1 Inſt. 157. b. Of whom. Coroners. So in Ejectment againſt four, upon Affinity of the Sheriff to one of the Defendants. Roll. *Tit.* Trial, 668. Examination. Not of the Defendant's Suggeſtion. The Defendant may not have a *Venire facias* to the Coroners.

And ſee in *Term. Hill.* 3 *H.* 7. *f.* 5. *placit. ult.* in a *Quare impedit*, where the Defendant ſhewed how the Sheriff was Couſin to the Plaintiff, and prayed a Writ to the Coroners, but it was denied him upon the ſame Reaſon. *Fitz.* Tit. *Suggeſtion*, *placit.* 8. *Br. Challenge*, 153.

In the Lord *Brooks*'s Caſe, *Trin.* 1657. *B. R.* In Ejectment, the Court was moved that the Lord *Brooks* might be made Ejector, which was granted; then the Court was informed that the Leſſor of the Plaintiff was High She-

riff of the County, and that the Coroner was Under-Sheriff; and it was prayed that *Elisors* might return the *Jury*; but the Court would not grant it at the Prayer of the Defendant, though the Plaintiff offered to agree to it, it being in a Trial by *Nisi prius*; but had it been in a Trial at Bar, they would have granted it. But the regular Course is for the Plaintiff to pray it, or else the Defendant may challenge the Array at the Assizes; for it is a principal Challenge, that the Lessor of the Plaintiff is High Sheriff, or of Kindred to the Sheriff; for which see *Hutt.* 25. *Moor* 470. *Roll. Rep.* 328. And it was so adjudged, *Trin.* 15 *Car.* 2. *B. R. Duncomb* and *Inglely*, that it is a principal Challenge.

For what Causes Process shall be directed to the Coroners.

In Ejectment, the Plaintiff suggested, That he and one of the Coroners were all of the Livery *del Countee Wigorn'*, and prayed a *Venire facias* to the other Coroner; although this is no principal Challenge, and the Defendant might have opposed the Prayer, yet because he confessed it, the Award was well to the Coroner. So if the Cause be, that one of the Coroners be retained of Counsel with the Plaintiff. If the Suggestion do not comprehend a principal Challenge, but only of Favour, this is not sufficient to award Process to the Coroners: But if it be a principal Challenge, as Affinity, *&c.* if the Defendant confess it, the Award shall be to the Coroners; if he will not confess it, then to the Sheriff; and in such Case the Defendant shall never challenge the Array for that Cause: So if the Plaintiff pray Process to the Coroners for Favour in the Sheriff, if the Defendant say that this is not favourable, he shall

never challenge for Favour, unleſs *de puiſne temps.* 2 *Roll. Trial*, 668. *H.*

If the Array be quaſhed, becauſe made by the Sheriff's Miniſter, who was aiding and of Counſel with one of the Parties, yet the Writ ſhall not be directed to the Coroners, but to the Sheriff, commanding him to make the Panel by another Officer; as, *ita quod* the Under-Sheriff *ne ſe intromittat, &c.* 2 *Roll. Trial*, 669. *pl.* 12.

Note; The Sheriff may appoint a general Officer in a Court, and his Return ſhall be good. *Keble* 1 Part 357.

If the *Tales* be quaſhed for Affinity in the Sheriff, but not the principal Panel, becauſe it was made before the Affinity, yet all ſhall be awarded to the Coroners, *ſcil.* the *Diſtringas* of the principal Panel, and that they return a new *Tales*; for there ſhall be but one Officer; if the Array be quaſhed, becauſe made but by one of the Coroners, or for Affinity in one, *&c.* yet the Proceſs ſhall ſtill go to the Coroners, *ita quod* the ſaid Coroner *ne ſe intromittat.* 2 *Roll. Trial*, 669. *pl.* 17, *&* 670. *K. pl.* 2.

To whom Proceſs ſhall be directed for Default in the Sheriff and Coroners.

If Default be in the Sheriff and Coroners, the Court may chuſe two *Eſliſors* (*a*); and if the Parties can ſay nothing againſt them, they ſhall make the Panel. *Ibid.* 670. *L. pl.* 1.

But the *Diſtringas* ſhall not be directed to *Eſliſors*, for the Court cannot make Officers to diſtrain the King's Liege People, but the King may. 8 *H.* 6. 12. *Dubitatur.*

2 Roll. Trial, 670. L. 2.

(*a*) *Eſliſors* are Perſons appointed by a Court of Law, to whom a Writ of *Venire facias* is directed to impanel a *Jury*, on *Challenge* to the *Sheriff* and *Coroners*; to return the Writ in their own Names, with a Panel of the Jurors Names. 15 *Ed.* 4. 24. *pl.* 4.

Proceſs may be directed to the Juſtices of Aſſiſe, by Aſſent of Parties, not without.

When a Panel is made by the *Eſſiſors*, they ſhall afterwards ſerve all Proceſs that comes upon this, as the Sheriff ſhould. 15 *Ed.* 4. 24. 18 *Ed.* 4. 3, 8. *Roll.* Tit. *Trial* 670. For it may be the Sheriff will diſtrain only thoſe who are his Friends and be partial.

1 Inſt. 158. *Venire facias* once directed to the Coroner, ſhall not be to the Sheriff afterwards.

When the Proceſs is once awarded to the Coroners, for a Default in the Sheriff, if there be a new Sheriff made afterwards, who is indifferent, yet the Proceſs ſhall not revert, but continue to the Coroners *pendant le Plea.* 14 *H.* 7. 31. *Bro.* Tit. *Venire facias* 17. So the Entry is, *Ita quod Vicecomes ſe non intromittat.* 18 *E.* 4. 3. 8 *H.* 6. 12. And though a new Sheriff comes in before it be returned, yet the Coroners ſhall proceed to the Execution of it.

Sheriff ſhall not return the *Tales*, where he cannot the *Venire facias*.

And therefore, where the Sheriff ought not to return the *Venire*, he cannot return the *Tales*. For in Error in the *Exchequer-Chamber*, of a Judgment in the *Queen's Bench*, the Error aſſigned was becauſe the *Venire facias* was awarded to the Coroners, for Conſanguinity in the Sheriff; and it was returned by Coroners, and afterwards the *Tales* was awarded, and it was returned by the Sheriff, and it was tried, and a Verdict given, and Judgment. And for this Cauſe held to be erroneous, and not aided by the Statute of 32 *H.* 8. or 18 *Eliz.* Wherefore the Judgment was reverſed. *Cro. El.* 574. *Bro.* Tit. *Octo Tales*, 9.

I will inſtance one Caſe more in the ſame Reports, *fol.* 586. becauſe it is very full in the Point. After Iſſue in Treſpaſs, the Plaintiff for his Expedition ſurmiſed, that he was Servant to the Sheriff, which being confeſſed by

the Defendant, the Proceſs was awarded to the Coroners; and after Verdict it was moved in Arreſt of Judgment, that the *Tales de circumſtantibus* was awarded, and returned by the Sheriff, which was held by the whole Court to be good Cauſe for ſtaying the Judgment; for it is a Miſ-trial not aided by any of the Statutes; for Proceſs being once awarded to the Coroners, the Sheriff afterwards is not the Officer to return the Jury, no more than any other Man; and Proceſs ought always to be returned by him, who is an Officer by Law to return it; otherwiſe it is merely void. But afterwards, upon View of the Record, it appeared that the *Tales* was returned by the Coroners, and their Names annexed thereto; wherefore it was without further Queſtion. But the Court ſaid, If their Names had not been annexed to the *Tales*, yet it had been well enough; for they be annexed to the firſt Panel, and it ſhall be intended that the right Officer returned it; and the uſual Courſe is, That to ſuch *Tales* there is not any Officer's Name ſubſcribed, and yet it is good enough; for it is not within the Statute of *York*, which appoints, That the Name of the Sheriff ſhould be ſubſcribed; but it was moved that the Record of the *Poſtea* is, That the *Tales* were returned by the Sheriff; but the Court held, That it was amendable, and it was done accordingly, and the Plaintiff had Judgment.

Where the Coroner returns the *Venire facias*, he ought to return the *Tales*.

No Name to the Return.

But if the *Venire* be awarded to the Coroners, for Default in the Sheriff, and they do nothing upon the Writ; then, upon a Default diſcovered in the Coroner, *de puiſne temps*, the Party may ſhew this to the Court, and have a *Venire* awarded to the Sheriff, (if

Venire facias to the Sheriff, after one awarded to the Coroners.

there be an indifferent one made in the mean Time) or elſe to *Eſliſors*, *& ſic è converſo*.

Venire facias to the Coroners, after one to the Sheriff.

In Error of a Judgment in *Cheſter*, the Parties being at Iſſue, a *Venire* was awarded to the Sheriff, and at the Day of the Return, it was entred *Quod Vicecomes non miſit breve*. And then the Plaintiff prayed a *Venire facias* to the Coroners, for Cozenage betwixt him and the Sheriff, which was awarded accordingly; and at the Day of Trial the Defendant made Default, and there, upon Judgment, Error was aſſigned, becauſe that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a *Venire facias* to the Coroners, without ſome Cauſe *de puiſne Temps*; *ſed non allocatur*, becauſe there was nothing done upon the firſt Writ. And the Defendant having made Default, it was not material. *Cro.* 3. Part 853.

No *Venire facias* to the Coroners, after one to the Sheriff.

But the Defendant might have demurred to this Prayer; for if the Plaintiff pray a *Venire facias* to the Sheriff, he ſhall not challenge the Array, nor have a *Venire* afterwards to the Coroners, becauſe the Sheriff is his Couſin, or for any other principal Challenge, whereof he might by common Intendment have Conuſance, when he ſo prayed the *Venire facias*; for upon ſhewing this Cauſe at firſt, he might have prayed Proceſs to the Coroners; but for a principal Challenge, of which, by common Intendment, the Plaintiff could not know at the firſt, as that the Defendant is of Kindred to the Sheriff, *&c.* he may afterwards challenge the Array when they appear; or if the Sheriff doth nothing upon the Writ, he may pray a new *Venire* to the Coroners. 15 *H.* 7. 9.

If

If the Plaintiff prays a *Venire facias* to the Coroners, becauſe he is of Kindred to the Sheriff, if the Defendant will not confeſs this, but denies it, this ſhall be entred, and the Defendant ſhall not challenge the Array for this Cauſe afterwards. *Br.* Tit. *Venire facias*, 21 and 23.

If the Defendant denies the Plaintiff's Suggeſtion, he ſhall have no Benefit of it by Challenge.

If a *Venire facias* be awarded to the Coroners, where it ought to be to the Sheriff, or the *Viſne* cometh out of a wrong Place, yet if it be *ex aſſenſu partium*, and ſo entred of Record, it ſhall ſtand; for *omnis conſenſus tollit errorem.* 1 *Inſt.* 126. *lib.* 5. 36. But if it be directed to the Coroners, where it ought to be to the Sheriff, without ſuch Conſent of Parties, this is an inſufficient Trial, not remedied by any Statute, except it be upon an inſufficient Suggeſtion, and then the Statute of 21 *Jac. c.* 13. helps it.

By Conſent, the *Venire facias* may be directed to a wrong Officer.

Miſ-trial without ſuch Conſent.

Upon Suggeſtion that the Plaintiff and the Sheriff, and one of the Coroners are of Kindred to the Plaintiff or Defendant, or upon any other Suggeſtion which contains a principal Challenge, the *Venire facias* may be directed to other Coroners. *Dyer* 367.

Venire facias to ſome of the Coroners.

Error of a Judgment in *Northampton*, becauſe in *Northampton*, the Court being held before the Mayor and two Bailiffs, the *Venire facias* upon the Iſſue was awarded to the two Bailiffs to return a Jury, before the Mayor and Bailiffs, *ſecundum conſuetudinem*, which being returned, and Judgment given, the Error aſſigned was, becauſe the Bailiffs being Judges of the Court, could not alſo be Officers to whom Proceſs ſhould be directed, there being no Cuſtom that can maintain any to be both Officer and Judge. But all the Court *(abſente Hyde)*

Bailiffs.

conceived it might be good by Cuſtom, and that it is not any Error; for the Judges be not the Bailiffs only, but the Mayor and Bailiffs; and it is a common Courſe in many of the ancient Corporations, where the Bailiffs are Judges, or the Mayor and they be Judges; yet in reſpect of executing Proceſs, they be Officers alſo; and one may be Judge and Officer *diverſis reſpectibus*; as in Rediſſeiſin, the Sheriff is Judge and Officer: Whereupon Judgment was affirmed. *Cro.* 1 Part 138.

Judge and Officer to return Writs.

In Treſpaſs and Aſſault laid in the Count, to be at the Palace of *Weſtminſter*, it was adjudged, That the *Venire facias* ſhall iſſue *al Garden del Palace*, and not to the Sheriff of *Middleſex*. *Bro.* Tit. *Ven. fac.* 31.

Venire facias to the Garden of the Palace of *Weſtminſter*. *Roll.* Tit. *Trial*, 667.

In Treſpaſs againſt two, if one plead, and two Iſſues are joined upon his Plea, and two other Iſſues are alſo joined, and the Court award a *Venire ad triandum tam exitum illum quam prædictum alium exitum inter* the Plaintiff and the other Defendant, *&c.* this is a good Award, although there be ſeveral Iſſues betwixt the Plaintiff and both Defendants, becauſe that this Word *Exitus* may be for all, *reddendo ſingula ſingulis*. *Hob.* 91.

Award of *Venire facias*.

If an Inqueſt remain for Default of *Rapers*, and a *Decem Tales* is awarded, and the Defendant ſaith for his Deliverance, That he is Lord of the *Rape*, where, *&c.* and that all there are within his Diſtreſs, and prays a Writ to the next Hundred; the Court may try this by *Triors* preſently, without a Return of the Sheriff; and if it be true, may award to the next Hundred; otherwiſe, if it be falſe. 3 *H.* 6. 39.

Prochein Hundred.

Rex

Variance between the *Venire* and *Diſtringas*, and yet good.

Rex verſus *Reed:* Upon an Information of Perjury at the Common Law, one of the Jurors was named *J. S.* in the *Venire*, and *J. S. junior* in the *Diſtringas*, and yet held to be good. 1 *Sid.* 66.

Where the Court will not alter the *Venue*.

In an Action on the Caſe for Deceit; or, in an Action on the Caſe for an Eſcape; the Court will not change the *Venue* from the County where the Plaintiff hath ſuppoſed the Fact to be done. 1 *Sid.* 87.

Venue from a Place containing ſeveral Vills.

Tubbe verſus *Whiteworth:* In an Action on the Caſe, it was moved in Arreſt of Judgment, That the *Venire facias* was of *Taunton-Dean*, and therefore no good Trial, for *Taunton-Dean* was a large Country, conſiſting of ſeveral Vills; but the Court held it to be good after Verdict, and that it ſhould be intended the Vill, and not all the Country of *Taunton-Dean*. 1 *Sid.* 88.

If the Iſſue be local, not to be changed by Conſent.

In *Kighly* verſus *Bulky*, it was held, That where the Iſſue was local, the *Venire* could not be changed by the Conſent of the Parties. 1 *Sid.* 339.

Cauſe of Action in two Counties, the Plaintiff may chuſe either.

Swaine's Caſe: If there be two Cauſes of Action in the Declaration, one in one County, and the other in another County; and *Affidavit* of the Cauſe of Action (if any) in one of them, yet that ſhall not exclude the Plaintiff of his Election; as in *Trover*, if the Defendant becomes poſſeſſed in *Kent*, and he brings the Goods and ſells them in *London*, and the Plaintiff brings his Action in *London*; there, upon the common *Affidavit*, the *Venire* ſhall not be removed from *London*; and in the principal Caſe now moved in *Aſſumpſit*, the Promiſe was agreed to be in *Dorcheſter*, and the Breach in *Middleſex*; and the Plaintiff declared in *Middleſex*,

dlesex, and the Court upon *Affidavit* would not change the *Venue* to *Dorcheſter*. 1 *Sid.* 405.

Venue twice changed.

King verſus *Atkins: Action ſur Aſſumpſit* was brought in *London*, and upon the common *Affidavit*, the *Venire* was changed to *Hampſhire*; and although it was changed, the Plaintiff in another Term made *Affidavit*, That his Cauſe of Action aroſe in *Northamptonſhire*, and upon a Rule, that he would not give in Evidence any Matter out of *Northamptonſhire*, it was laid there, notwithſtanding he had firſt laid it in *London*. 1 *Sid.* 442.

Where there are two Sheriffs, and one challenged, the *Venire* ſhall be directed to the other Sheriff, and not to the Coroners. *Shower* 329. *Comberb.* 191. 1 *Salk.* 144. *Carthew* 214.

One Sheriff not indifferent, *Venue*, to be directed to the other.

If any Plaintiff, or Demandant, being at Iſſue, ſhall bring to the Sheriff any Writ of *Habeas Corpora*, or *Diſtringas*, with a *Niſi prius* Iſſue, in order to try ſuch Iſſue at the Aſſizes, and ſuch Plaintiff or Demandant ſhall not proceed to Trial at the firſt Aſſizes after the *Teſte* of ſuch *Habeas Corpora*, *&c.* In all ſuch Caſes, other than where Views of Jurors ſhall be directed, the Plaintiff or Demandant, when he ſhall think fit to try the ſaid Iſſue at any other Aſſizes, ſhall ſue forth a new Writ of *Venire*, whereupon the Plaintiff or Demandant may proceed to Trial; and ſo *toties quoties*, as the Caſe ſhall require: So alſo where the Tenant or Defendant ſhall bring the Cauſe to Trial by *Proviſo*. 7 & 8 *W.* 3. *cap.* 32.

Venire de novo to iſſue, where the Parties do not proceed to Trial at the firſt Aſſizes after the *Teſte* of the *Habeas Corpora* or *Diſtringas*.

By *Stat.* 3 *G.* 1. *c.* 15. *ſect.* 8. It is enacted, 'That if any High Sheriff of any County of 'England or *Wales*, ſhall happen to die before 'the Expiration or Determination of his Year, 'or before he be lawfully ſuperſeded, in ſuch

'Caſe

'Caſe the Under-Sheriff, or Deputy Sheriff by 'him appointed, ſhall nevertheleſs continue in 'his Office, and ſhall execute the ſame, and all 'Things belonging thereto, in the Name of 'the ſaid deceaſed Sheriff, until another Sheriff 'be appointed for the ſaid County, and ſworn 'in the Manner as is herein after directed. 'And the ſaid Under-Sheriff or Deputy-She-'riff ſhall be anſwerable for the Execution of 'the ſaid Office in all Things, and to all Re-'ſpects, Intents and Purpoſes whatſoever, du-'ring ſuch Interval, as the High Sheriff ſo de-'ceaſed would by Law have been, if he had 'been living; and the Security given to the 'High Sheriff ſo deceaſed, by the ſaid Under 'Sheriff and his Pledges, ſhall ſtand, remain, 'and be a Security to the King, his Heirs 'and Succeſſors, and to all Perſons whatſo-'ever, for ſuch Under Sheriff's due Perform-'ance of his Office during ſuch Interval.'

Note; Since the Jury Act 3 *Geo.* 2. *c.* 25. the *Venire facias* muſt be *de corpore comitatus* in Actions upon *penal* Statutes. 2 *Str.* 1085.

CHAP.

CHAP. IV.

What Faults in the Venire Facias *ſhall vitiate the Trial, what not. When a* Venire Facias de novo *ſhall be awarded; when ſeveral* Venire Facias's. *When the* Venire Facias *ſhall be betwixt the Party and a Stranger to the Iſſue; who may have* Venire Facias *by* Proviſo, *and when.*

Venire facias, why the Writ ſo called.

WE have now ſhewed you to what Officer the *Venire facias* ſhall be directed; the next Step in the Writ is *Præcipimus tibi quod Venire facias:* Which Words *Venire facias* are the moſt effectual Words in the Writ, and therefore they give the Denomination to the whole Writ: And here Opportunity is offered us to ſpeak ſomething of a *Venire facias* in general. I am not ignorant how our Books ſwarm with Caſes, which ariſe from the Defects in this Proceſs, and how that Verdicts have been ſet aſide, Judgments ſtayed and reverſed, for want of ſufficient Returns, Miſawarding, Diſagreement with the Rolls, Diſcontinuance, and many other Faults in this Writ. But the Statutes of *Jeofails* (eſpecially the Statute 21 *Jac.* 1. *cap.* 13.) have pardoned (as I may ſo ſay) theſe Enormities: As, *The Awarding his Writ,* Hab. Corpora, *or* Diſtringas, *to a wrong Officer, upon any inſufficient Suggeſtion, or by Reaſon the* Viſne *is in ſome Part miſawarded, or ſued out of more Places or fewer Places than it ought to be, ſo as ſome Place be right*

Statute of *Jeofails,* 21 *Jac.* 1. 13.

right named: The Misnaming of any of the Jury, either in Surname, or Addition in any of the said Writs, or in any Return thereupon, so that upon Examination it be proved to be the same Man that was meant to be returned; or if no Return be upon any of the said Writs, so as a Panel of the Names of the Jurors be returned, or annexed to the said Writ; or if the Sheriff or Officer's Name, having the Return thereof, is not set to the Return of any such Writ, so as upon Examination it be proved that the said Writ was returned by the Sheriff or Under Sheriff, or such other Officer: In all these Cases the Judgment shall not be stayed nor reversed for these Defects.

But this Act doth not extend to any Writ, Declaration, or Suit of Appeal of Felony or Murder, nor to any Indictment or Presentment of Felony or Murder, or Treason; nor to any Process upon any of them; nor to any Writ, Bill, Action, or Information upon any popular or penal Statute; wherefore, since Informations and popular Actions are grown so frequent, the Attornies, *&c.* herein had best beware of these *Jeofails.*

Popular Action, *&c.*

By this Statute many Defects are remedied, which are not by the Statutes of 32 *H.* 8. *cap.* 20. and 18 *Eliz. cap.* 14. yet all are not; for this Act only helps the Misnaming of a Juror in Surname, or Addition, and saith nothing of his Christian Name: Wherefore I conceive the Law in *Codwell*'s Case, in the fifth Report, as it was then; which is, that if a Juror be misnamed in his Christian Name on the *Venire*, though he be named right in the *Distringas* and *Postea*, yet this is ill, and not amendable; and with this agrees *Goddard*'s Case, *Cro.* 2 Part 458.

Christian Name mistaken in the *Venire facias*, incurable.

And

Christian Name right in the *Venire facias*, and wrong in the *Distringas*.

And since the Court (*Cro. Car. fol.* 203.) doubted thereof, I may well put the Question; If a Juror be right named upon the *Venire*, and misnamed in his Christian Name in the *Distringas*, *&c.* whether this is amendable, or not? Without Dispute it is not by the Statute of 21 *Jac.* for that only helps the Surname. But with Reverence to the Court's Doubt, I conceive clearly, it is holpen by the Statutes of 32 *H.* 8. and 18 *Eliz.* as a Discontinuance of Process; and I may with the more Confidence believe it, because in *Codwell*'s Case aforesaid, where, in the Panel of the *Venire*, a Juror was named *Palus Cheale*, and in the *Distringas*, *&c.* he was right named *Paulus Cheale*; and so, because he was misnamed in his Christian Name in the *Venire*, Judgment was arrested. But it is there adjudged, That if he had been well named upon the *Venire*, and misnamed on the *Distringas* or *Postea*, then upon Examination it should be amended. But the Countess of *Rutland*'s Case, *Lib.* 5. 42. is express in the Point, and so is *Cro. Eliz.* 860. *Rol.* 196. *Teppet* in the *Venire*, and *Tipper* in the *Distringas*, amended. And so if the Mistake be in the Panel *Jurata*, the Sheriff may come into Court and amend it. And so if *Samuel* be in the *Venire* and *Distringas*, and *Daniel* in the *Nomina Juratorum*, upon Examination, this may be amended. And so if the Name be right in the *Venire*, and mistaken in the Christian Name in the *Distringas* or *Postea*, it is amendable. *Rol.* 197. And so if he be *de A.* in the *Venire* and *Distringas*, and *de B.* in the *Nomina Juratorum*, this is amendable.

And it is to be known, that in most Cases where the *Venire facias*, *Habeas Corpora*, or *Distringas*

Diſtringas be defective, they are to be amended; but if the Malady be ſo fatal in the *Venire*, that it cauſes a Miſ-trial, (as in the Miſtake of a Juror's Chriſtian Name, or where a Juror not returned, is ſworn, *&c.*) then the Verdict is to be ſet aſide, and a *Venire facias de novo* to be awarded; and ſo was it to be upon thoſe Miſtakes, (now amendable by the Statutes) before the making thereof; and where a Jury giveth a Verdict, which is accepted and recorded by the Court, be the Verdict perfect or imperfect, the Jurors are diſcharged, and ſhall never try the ſame Iſſue again upon a new *Niſi prius*. But if the Verdict be ſo imperfect, that Judgment cannot be given upon it, then the Court ſhall award a *Venire facias de novo*, to try the Iſſue by other Jurors. *Lib.* 8. 65. *Bulſtr.* 2 Part 32.

Venire facias de novo.

One Jury ſhall not try a Cauſe twice.

If upon an Iſſue all the Matter be not fully inquired, a *Venire facias de novo* ſhall iſſue. 18 *E.* 3. 50.

Venire facias de novo.

In an *Audita Querela*, If the Parties go to Iſſue upon Payment, according to the Defeazance of the Statute, and this is found for the Plaintiff, but the Jury do not aſſeſs Damages, the Court ſhall award a *Venire facias de novo*, to aſſeſs Damages. 22 *E.* 3. 5. *Vide hic cap.* 6. and *Roll.* Tit. *Trial*, 593. *pl.* 11.

If the Record of the *Niſi prius* be *unum modum tritici* for *modium*, and the Plaintiff is nonſuit at the Aſſize, for this Miſtake, if the Record in Court be right, *ſcil. Modium*, this Nonſuit ſhall not be recorded, but a *Venire facias de novo* ſhall be awarded. So for any other Miſtake, as if the Record in Court be in *Grays-Inn-Lane*, *&c.* and the *Niſi prius*, which is but a Tranſcript, be *Graves-Inn-Lane*, *&c.* For this

this is a Nonſuit upon another Record than what is in Court. *Roll. Trial*, 721. *pl.* 5 & 9.

In Battery againſt Three, who plead three ſeveral Pleas, and upon the Writ of *Niſi prius*, two Iſſues are found for the Plaintiff, and Damages aſſeſſed; but nothing is found for the third Iſſue; this is a Miſ-trial, and a *Venire facias de novo* ſhall iſſue. *Ibid.* 722. *pl.* 13.

Detinue. In Detinue, if the Jury find Damages and Coſts, but no Value, as they ought, this ſhall not be ſupplied by a Writ of Inquiry of Damages, but a *Venire facias de novo* ſhall be granted. And ſo of other Defects in finding the full Iſſue. *Ibid. pl.* 15.

Venire facias de novo. In a *Quare Impedit*, if the Iſſue be found for the Plaintiff, but by Negligence the Jury do not inquire of the four Points, *ſcil. de plenitudine, ex cujus Præſentatione, ſi tempus ſemeſtre tranſierit*, and the Value of the Church *per Annum*; this ſhall be ſupplied by a Writ of Inquiry, without a *Venire facias de novo*, becauſe the Court *ex Officio* ought to have charged the Jury with the four Points of Inquiry; and if the Jury had found them, no Attaint lay; for as to this, they were but as an Inqueſt of Office. *Ibid. pl.* 16. 10 *Coke* 118. *Dyer* 135.

Annuity. In a Writ of Annuity, if the Iſſue be found for the Plaintiff, but the Jury do not aſſeſs Damages or Coſts, this ſhall not be ſupplied by a Writ of Inquiry, but a *Venire facias de novo* ſhall be granted. *Roll. Trial*, 722. *pl.* 17.

Ejectment. In Ejectment againſt Baron and Feme, and the Jury find the Wife Not guilty, and find a Special Verdict as to the Huſband, which ſpecial Verdict is afterwards adjudged inſufficient by the Court, a *Venire facias de novo* ſhall be granted for both, as well the Wife as the Huſband,

band, and the Wife may be found guilty, becauſe the Record and Iſſue is intire, and the Verdict is inſufficient and void *in tout*. *Ibid. pl.* 18.

So if there be ſeveral Iſſues, and the Jury find ſome well and directly, and in others ſpecial Verdicts, which are imperfect, a *Venire facias de novo* ſhall be granted for all, and the Jury may find contrary to their firſt finding. *Ibid. pl.* 19. Imperfect Verdict.

In Treſpaſs of Aſſault and Battery, and taking away of Grain; and the Defendant, as to the Battery, juſtifies in Defence of his Grain; upon which the Plaintiff demurs; and as to the Grain he pleads Not guilty, which is found for the Plaintiff, and the Jury do not tax Damages for the Battery depending in Demurrer as they ought; in this Caſe, if the Demurrer be afterwards adjudged for the Plaintiff, yet the Damages for this cannot be afterwards ſupplied and taxed by a Writ of Inquiry of Damages, but a *Venire facias de novo* ſhall iſſue to Trial, becauſe all is compriſed in the Original. *Vide apres*, *cap.* 13. and *devant*, *cap.* 2. *Ibid. pl.* 20.

Who ſhall grant it?

In a *Scire facias* upon a Recognizance in *Chancery*, if the Parties be at Iſſue, upon which the Record is commanded into *B. R.* and there it appears that the *Venire facias* is not well awarded, the *Venire facias de novo* ſhall be awarded in the *King's Bench*, and not in the *Chancery*. *Roll.* Tit. *Trial*, 723.

In *Yelverton*'s Reports, *fol.* 64. The Caſe is, That a *Venire facias* was made *Vicecomiti*, leaving out *Salop*, for which there was a Blank left in the Writ. But *revera* it was returned by the Sheriff of *Salop*. In Arreſt of Judgment it *Album breve*, the County left out in a *Venire facias*,

was alledged, That the *Venire facias* was vitious for this Cauſe; but *Gawdy* ſaid it ſhould be amended; and by *Fenner* and *Williams*, it is as no Writ, becauſe it is not directed to any Officer. And then it is aided by the Statute of *Jeofails*; for it might rather be called a Blank than a Writ, becauſe it was directed to no Officer. If there be no Return of the Sheriff indorſed upon the *Venire facias*, it was held not amendable. 35 *Eliz. Lib.* 5. 41. Otherwiſe of the *Diſtringas*, if that be *Album breve*, and no Return, if the *Venire facias* be right. *Roll. Amendment*, 204. *pl.* 2, 3.

Several *Venire facias's.*

In Caſes where there are ſeveral Defendants, who plead ſeveral Pleas, the Plaintiff may chuſe either to have one *Venire facias* for all, or ſeveral for every one of the Defendants; but (if you will be ruled by *Standford*) the ſureſt Way is to have a *Venire facias* againſt every one, and then one cannot have Benefit of the other's Challenge; neither ſhall the Death of one abate the *Venire facias* againſt the other, (this he ſpeaks of in Appeals); but if the Court once award a joint *Venire facias*, you cannot have ſeveral *Venire's* afterwards, though there be nothing done upon the firſt; except it be upon Matter *de puiſne Temps*, as the Death of one of the Defendants, *&c. Lib.* 8. 66. *Lib.* 11. 5, 6. *Staundf.* 155. *Bro.* Tit. *Venire facias* 2. 35.

One *Venire facias* in ſeveral Iſſues. Vide Roll. *Tit.* Trial, 596, 620, 667. Hob. 88, 51.

But now it is the uſual Courſe to have but one *Venire facias* upon ſeveral Iſſues, though againſt ſeveral Defendants. *Cro.* 3 Part 866. *Hob.* 36, 64. And ſo uſual, that the Court declared, *Cro.* 2 Part 550. That there never ſhall be ſeveral *Venire facias's* to try ſeveral Iſſues in one County; for what need the Plaintiff trouble himſelf and the Country with ſeveral, when

when one Jury will ſerve his Turn; *Et fruſtra fit per plura quod fieri poteſt per pauciora.* But otherwiſe if it be in two Counties. *Cro.* 3 Part 866.

If *A. B. C.* and *D.* be indicted for one Felony or Murder before any Juſtices, they may iſſue one *Venire* or ſeveral.

If the Sheriff and another be joint Obligors in a Bond, and one pleads *non eſt factum*, and the other Conditions performed, and Proceſs is awarded to the Coroners, and the Iſſues tried by one *Venire*, yet this is good.

There is a great Difference between a ſeveral and a joint Plea, for where many join, there goes but one *Venire*; but where they ſever then there ſhall be ſeveral *Venires*; or if there be but one, it muſt be ſpecial, and mentioned to be for the Trial of ſeveral Iſſues. *Vin. Trial*, 300.

Venire facias between the Plaintiff and two Defendants, where one is dead.

After Iſſue joined by two Defendants, if one of them die, and then a *Venire facias* is awarded betwixt the Plaintiff and both the Defendants, and ſo in the *Habeas Corpora* and *Diſtringas*, yet this ſhall not vitiate the *Venire facias*, *&c.* to make Error; becauſe, though one of the Defendants be dead, yet the other being alive, it is ſufficient. And there needs be no Surmiſe in Judicial Writs, that one of the Defendants is dead; it is Time enough to ſhew it to the Court at the Day in Bank. *Cro.* 1 Part 4, 26. But if there be two Defendants, and the *Venire facias* be but againſt one of them, it is Error. 7 *H.* 4. 13. and *Bro.* Tit. *Ven. fac.* 11 *Cro.* 1 Part 426.

No Surmiſe in Judicial Writs of Death of one of the Parties.

Venire facias dated before the Action brought.

If the *Venire facias* bears Date before the Action brought, or varies from the Roll, yet it is aided by the Statutes of *Jeofails*. *Cro.* 1 Part 38, 90, 91, 203, 204. *Miſcontinuance or*

Diſcontinuance, or Miſconveying of Proceſs, is aided by 32 *H.* 8. 30. *The Want of any Writ original or judicial, Defaults in their Form, and inſufficient Returns thereupon, are aided by* 18 Eliz. 14. Cro. 3 Part 259. But you muſt have a Care the *Venire facias* be not faulty in any other Matters of Subſtance; for if the Parties Names be miſtaken, or the Iſſue, as if the Iſſue be *ne unque Executor*, and the *Venire facias* be *in placito debiti, &c.* this is a Miſ-trial. *Cro.* 2 Part 528. So it is if the *Venire facias* be *in placito tranſgreſſionis*, where the Action is *in placito tranſgreſſionis & ejectionis firmæ.* This Miſawarding of Proceſs is not aided by any of the Statutes; and better it were that there had been no *Venire facias* at all in ſuch a Caſe, for then the Statutes would have holpen it. *Cro.* 3 Part 622. *Stat.* 18 *Eliz.* 14.

Parties Names miſtaken in a *Venire facias*, Miſ-trial.

No *Venire facias* holpen.

Return of Proceſs.

If a *Venire facias* be directed to the Coroners, all the Coroners ought to join in the Return, they being Miniſters, not Judges; and ſo both the Sheriffs of *London* ought to join, or elſe the Return is not good. *Hob.* 97.

Where the Writ is awarded to the Coroners *ex aſſenſu partium*, it is good, though the Defendant might otherwiſe have croſſed the Prayer.

Where it is to be awarded to the Coroners, and where it is not a principal Challenge; yet if the Defendant confeſs it, it is good; but if it be not confeſſed, the Court will not grant it, for the Defendant may have his Challenge if it be favourably made: But if the Plaintiff had ſaid the Sheriff had been his Relation, or any other principal Challenge, the Proceſs ſhall go to the Coroners, for the Matter came from the Plaintiff himſelf; whereas in the other Caſe, it cannot be tried but by the Confeſſion of the Party

Party himſelf. If the Defendant had ſaid, the Sheriff was not favourable but an indifferent Man, there he ſhall not challenge for Favour unleſs he ſhewed ſome Cauſe ſubſequent.

In Debt the Plaintiff prayed a *Venire* to the Coroners, becauſe the Sheriff was his Maſter. After Verdict for the Plaintiff, this Matter was moved in Arreſt of Judgment, as being no principal Challenge; but the Plaintiff had his Judgment, though he did not conclude to the Favour. *Vin. Trial*, 305.

Proceſs ſhall not iſſue to the Coroners but where Default is in the Sheriff himſelf; and where the Writ is once awarded to the Coroners for Default in the Sheriff, no ſubſequent Proceſs ſhall be awarded to the Sheriff, though pending the Plea a new and indifferent Sheriff be appointed; for the entry is general *quod vic. ſe non intromittat.*

In *Replevin* the Parties were at Iſſue, and the Avowant confeſſed himſelf to be Sheriff, and prayed a *Venire* to the Coroners, and had it. *Ibid.* 307.

Upon Confeſſion that one of the Coroners was of Affinity to the Party, the Array was quaſhed, and new Proceſs iſſued to the other Coroners, *ita quod the Coroner of Kin ſe non intromittat.* Ibid. 308.

Where a *Venire* is awarded to Coroners, and no Challenge be ſuggeſted upon the Roll to warrant it, this is Cauſe to ſtay Judgment, and not aided by any Statute; nor can the Court amend the Direction of Proceſs to a wrong Officer. *Ibid.* 309.

Note; The principal Statutes of *Jeofails* are 8 *H.* 6. *cap.* 12. and *cap.* 15. 32 *H.* 6. *cap.* 30. 18 *Eliz. cap.* 14. 21 *Jac. cap.* 13. and 16 &

17 *Car.* 2. 8. intitled, *An Act to prevent Arrests of Judgments, and superseding Executions.* And the three first of these Statutes do not extend to Appeals, nor to Pleas of the Crown, or any Proceedings upon them, for these are excepted, nor to the Amendment of any Exigent, to make any one outlawed. As you may see at large, *Lib.* 8. 162. *Blackmore*'s Case.

Note; If the *Distringas* be betwixt wrong Parties, as if the Parties Names are mistaken, the Judge of Assize cannot proceed if the Mistake be insisted upon; although it would have been no Error after Verdict; held so before Justice *Windham*, *Lent Assizes*, 1681. And so I have known it ruled by other Judges, and the Trial refused. See *Littleton*'s Reports 253.

And the four last of the said Statutes do neither extend to them, nor to Actions or Informations upon Penal Laws, only in the last of them, *viz.* 16, 17 *Car.* 2. there is a Limitation in the Negation of the Extent, *scil. Other than concerning Customs, Subsidies of Tonnage and Poundage, to which it doth extend.*

If the *Venire facias* be directed *Vicecomiti London Salutem, &c. Præcipimus tibi*, and not *vobis*, after Verdict this is amendable. 39 *Eliz. B. R.* Adjudged. *Roll. Amendment*, 200. *pl.* 31.

And so it is, if after *& habeas ibi hoc breve, & Nomina Juratorum* be left out. *Ibid.* and 204. *pl.* 7.

But if the Award of the *Venire facias* upon the Roll be right, and the Writ wrong, it may be amended by the Roll, as the Misprision of the Clerk. *Ibid.* 201. *pl.* 36.

If the Words *Quorum quilibet habeat* be left out, or *duodecim*, or *qui nulla affinitate attingunt*, or *Vicecomiti* be left out, these are amend-

able as Miſtakes of the Clerk. *Roll.* 204, 205. *pl.* 8, 9, 10. *Amendment.*

By Stat. 5 *G.* 2. *c.* 13. it is enacted, 'That 'where any Verdict hath been or ſhall be given 'in any Action, Suit, Bill, Plaint, or De- 'mand in any of his Majeſty's Courts of Re- 'cord at *Weſtminſter*, or in any other Court of 'Record within *England* or *Wales*, the Judg- 'ment thereupon ſhall not be ſtaid or reverſed 'for any Defect or Fault either in Form or 'Subſtance, in any Bill, Writ Original or Ju- 'dicial, or for any Variance in ſuch Writs from 'the Declaration or other Proceedings.

'Provided nevertheleſs, that nothing in this 'Act contained ſhall extend or be conſtrued to 'extend to any Appeal of Felony or Murder; 'or to any Proceſs upon any Indictment, Pre- 'ſentment or Information, of or for any Of- 'fence or Miſdemeanor whatſoever.

Venire facias between a Party and a Stranger.

In ſome Caſes a *Venire facias* ſhall be awarded to make an Inqueſt betwixt a Stranger to the Writ and Iſſue, and the Party. I will inſtance but in one, and that is upon the Statute of *Weſtm.* 2. *cap.* 6. If a Tenant being impleaded to vouch to Warranty, and the Vouchee denieth the Deed, or other Cauſe of the Warranty, *&c.* that the Demandant may not hereby be delayed, he may ſue out a *Venire facias* to try the Iſſue between the Tenant and Vouchee.

Inqueſt, at whoſe Requeſt.

Inqueſts in Pleas of Land ſhall be as well taken at the Requeſt of the Tenant, as of the Demandant. 2 *Edw.* 3. *cap.* 16. If the Plaintiff or Demandant deſiſteth in proſecuting his Action, and bringeth it not to Trial, then the Defendant or Tenant may ſue forth a *Venire facias* with a *Proviſo*, which is to no other End but that the Sheriff ſhould ſummon but one Jury, if

Venire facias by Proviſo.

the Plaintiff alſo ſhould have brought him another Writ to the ſame Purpoſe; and although (as my Lord *Dyer* ſaith, *fol.* 215.) the Granting of this *Venire facias*, *&c.* with a *Proviſo*, depends much upon the Diſcretion of the Court, yet for the greater Part it is not grantable for the Defendant, unleſs when he is Actor as well as the Plaintiff; or unleſs there be a Default, and *Laches* in the Plaintiff; therefore there can be no Trial by *Proviſo* againſt the King (unleſs with the Attorney General's Conſent) becauſe no Default or *Laches* can be imputed to the King.

Proof preſently after Iſſue joined.

But an Avowant in Replevin may have a *Venire facias* with a *Proviſo*, immediately after Iſſue joined, becauſe he is Actor, and in Nature of the Plaintiff.

Garniſhee.

If the Plaintiff in Detinue and the Garniſhee be at Iſſue, and the Plaintiff prays a *Niſi prius*; and this is granted; yet the Garniſhee at the ſame Time may have a *Niſi prius* with *Proviſo*, becauſe he is Plaintiff alſo. *Lib.* 6. 46. *Roll.* Tit. *Trial*, 629.

Tarde.

If the Plaintiff deliver the Writ to the Sheriff *tarde*, ſo late that he cannot ſerve it, the Defendant ſhall have a Writ with *Proviſo*. *Roll. Trial*, 666. *B. pl.* 1.

But at the ſame Time the Plaintiff may have another Writ, and the Sheriff may return which of them he pleaſes at his Election. *8 H.* 6. 6. *Ibid. pl.* 2.

The *Proviſo* ought to be, *quando duo brevia ſunt in eodem gradu & qualitate.* Ibid. pl. 1.

If the Default be in the Plaintiff after Iſſue in the proſecuting of the *Venire facias*, then the Defendant may have a *Venire facias* with *Proviſo*, but not a *Habeas Corpora* with a *Proviſo*, until the Plaintiff hath made a Default in the

ſame Writ; for he ought only to have the ſame Proceſs with a *Proviſo*, in which there was a Default of the Plaintiff firſt: And therefore, although the Defendant had a *Venire facias* with a *Proviſo* upon a Default of the Plaintiff, yet he cannot have a *Niſi prius* by *Proviſo*, without another Default of the Plaintiff. *Ibid. pl.* 2.

If the Defendant had a *Habeas Corpora* by *Proviſo*, and the Jury remain for want of Hundredors, yet he cannot have a *Diſtringas Jur.* with a *decem Tales cum proviſo*, until a Default of this Requeſt of a *Tales* is in the Plaintiff. *D.* 15 *El.* 318. 10.

How the Plaintiff may ſtop the Defendant's *Proviſo*.

But *Note* the *Nota* (in *Staundford*'s Pleas *del Coron. fol.* 155.) That if by Negligence of the Plaintiff, the Defendant ſues a *Venire facias* with a *Proviſo*, yet the Plaintiff may at his Pleaſure ſtay the Defendant, that he ſhall not proceed in his Proceſs, in praying a *Tales* upon the Defendant's Proceſs, as it appears *T.* 15 *H.* 7. *fol.* 9. And the Defendant ſhall never be received to purſue this Proceſs with a *Proviſo*, ſo long as the Plaintiff purſues, or is ready to purſue, as appears *Mich.* 14 *H.* 7. *fol.* 7.

Mich. 10 *Geo.* 2. *B. R. Dodſon* verſus *Taylor*. The Plaintiff having ſlept over an Aſſizes, the Defendant gave Notice of Trial, and carried the Cauſe down to Trial by *Proviſo* the then laſt Aſſizes at *Kingſton*; but the Defendant not having entred a Rule for that Purpoſe with the Clerk of the Rules, the Words of which are, *fiat Niſi prius per proviſo ſi querens fecerit defaltam.* The Court on Debate ſet aſide the Nonſuit for Irregularity.

And

Tales Men.

And ſeeing the *Tales* (*a*) Men offer themſelves to us, we will tell them upon what Account they come, before they thruſt themſelves into the Inqueſt, commonly for the Love of eight Pence; but it may be to do ſome of their Neighbours a ſhrewd Turn.

Venire facias de novo awarded, where intire Damages, and Part of the Words not actionable. *Pract. Reg. in C. P.*

Verdict ſet aſide, the *Venire* being returnable at a Day ſubſequent to the Aſſizes, for till after the Return of the *Venire*, and Default by the Jurors, there could be no *Niſi prius*. Note, the Jury Proceſs was returnable properly. 2 *Barnes's Notes* 377.

Return of *Venire facias*, if defective, within the Statutes of Amendment. 2 *Barnes's Notes* 3.

(*a*) *Tales*, is uſed in the Law for a Supply of Men impanelled on a Jury and not appearing, or on their Appearance challenged as not indifferent; when the Judge upon Motion orders a Supply to be made by the Sheriff, *&c.* of one or more *ſuch* Perſons preſent in Court, equal in Reputation to thoſe that were impanelled, to make up a full Jury. See *Poſtea*.

CHAP.

CHAP. V.

Why the Venire Facias *runs to have the Jury appear at* Westminster, *though the Trial be in the Country. Of the Writ of* Nisi Prius, *when first given, when grantable, when not, and in what Writs. Of Justices of* Nisi Prius. *Of the* Tales *at Common Law and by Statute. When the Transcript of the Record of the* Nisi Prius *differs from the Roll, whereby the Plaintiff is nonsuited, he may have a* Distringas de novo.

BUT to observe the Method of the Writ, the next Words are *coram Justiciariis nostris de Banco apud Westminst. tali die.* And here first of all you may ask me, to what Purpose the Sheriff is commanded to cause the Jury to come to *Westminster*, when they are to try the Cause in the Country; and in Truth are not to come to *Westminster?* I must confess, The Resolution of this Question is not unnecessary. Wherefore we must know, That originally, before the Writ of *Nisi prius* was given, the Purpose for which the twelve Men were to be summoned upon the Writ of *Venire facias* to come to *Westminster*, was that contained in the Writ, *videl. ad faciend. quandam Juratam*; for then was the Trial intended to be there, if a full Jury appeared; if not, then a *Habeas Corpora*, (with a *Tales* sometimes annexed to it, the Form whereof you may see in the Register); and if they did not appear at

Why the *Venire facias* is to have the Jury appear at *Westminst. Hab. Corp.*

Diſtringas.

at the Return in the *Habeas Corpora*, then went out the *Diſtringas*. This I ſpeak of the *Common Pleas:* But the Courſe of the *King's Bench* and *Exchequer* is, after the *Venire facias*, to have a *Diſtringas*, leaving out the *Habeas Corpora*. Trials then were all at Bar. (I ſpeak not of Aſſizes.) But now, becauſe Jurors did not uſe to appear upon the *Venire facias*, it being without Penalty, Trials at the Bar are appointed upon the *Habeas Corpora* and *Diſtringas*, becauſe the Jury will more certainly appear at the Day of the *Diſtringas*, through Fear of forfeiting Iſſues; which the Sheriff returns on the *Diſtringas*, not on the *Venire facias*. By the Statute of 18 *Eliz. cap.* 5. no Jury ſhall be compelled to appear at *Weſtminſter*, for the Trial of an Offence (upon any Penal Law) committed above thirty Miles from *Weſtminſter*, except the Attorney General can ſhew reaſonable Cauſe for a Trial at Bar.

Trials at Bar.

Where a Jury is not compellable to appear at *Weſtminſter.*

Thus it was at Common Law, before the giving of the Writ of *Niſi Prius*, when all Jurors, together with the Parties, came up to the King's higher Courts of Juſtice, where the Cauſe depended; which (when Suits multiplied) was to the intolerable Burden of the Country. 27 *E.* 1. *cap.* 4. Wherefore by the Statute of *Weſtminſter* 2. *cap.* 30. a Writ of *Niſi Prius* was firſt given; and that in the *Venire facias*, as we may ſee in the Form of the Writ there mentioned, *ſcil. Præcipimus tibi quod Venire facias coram Juſticiariis noſtris apud Weſtmon. in Octabis Sancti Michaelis, niſi tali die & loco ad Partes illas venerint* 12 *&c.* By which Writ it appears, that the *Venire facias* was not returnable till after the Day of the *Niſi prius*. But the Miſchief thereof was ſo great

Niſi prius, when firſt given, and wherefore. *Staundford's* Pleas of the Crown 156.

Niſi prius in the *Venire facias.*

great, partly in respect that the Parties not knowing the Jurors Names, could not tell how to make their Challenges, and so were surprised; and partly in respect of the Jury, who were greatly delayed by the Essoigns of the Parties, that by the Statute of 42 *Ed.* 3. *cap.* 11. it is ordained, *That no Inquest, but Assizes and Deliverances of Goals, be taken by Writ of* Nisi Prius, *nor in other Manner at the Suit of great or small, before that the Names of all them that shall pass in the Inquest be returned in the Court.* And their Names must be returned upon a Panel annexed to the *Venire facias*, so that either Party may have a Copy of the Jury, that he may know whom to challenge; and the Jury not coming upon the *Venire facias*, make a feigned Default, which warrants the *Distringas*, *&c.* unless they appear at the Day of *Nisi prius*.

The Names of the Jurors must be returned into the Court before any Trial, and why.

So that by what hath been said, you may perceive to what Purpose the Sheriff is commanded to cause the twelve Men to come to *Westminster*, though the Trial be in the Country. And that, *ad faciend. quandam Juratam*, becaus it is in the Discretion of the Court, whether to grant a Writ of *Nisi prius*, or to have a Trial at the Bar. And for this, the Duke of *Exeter* being Plaintiff in Trespass, a *Nisi prius* was prayed for the Duke, and it was denied; for that the Duke was of great Power in that County. And if the Trial should be had in the Country, Inconvenience might thereupon follow, as you may read, 2 *Inst.* 424. and 4 *Inst.* 161. Nay, in some Cases (as if the Cause require long Examination, *&c.*) it is not in the Power of the Court to grant a *Nisi prius*, if the King please: For in such Cases, as appears by the Writ in the Register 186.

It is in the Court's Discretion, whether to grant a *Nisi prius* or not.

When the Court cannot grant a *Nisi prius*.

the

the King by his Writ may reſtrain, and command the Juſtices that they ſhall not award any Writ of *Niſi prius*, and if they have, that they ſuperſede it. *F. N. B.* 240, 241. No *Niſi prius* ſhall be granted where the King is Party, without ſpecial Warrant from the King, or the Attorney General's Conſent. *Staundf.* 156. *F. N. B.* 241. 4 *Inſt.* 161. 2 *Inſt.* 424.

Where the King is concerned.

In a *Præcipe quod reddat*, if the Tenant after Aid of the King pleads to the Inqueſt, the Plaintiff ſhall not have a *Niſi prius*, becauſe the Tenant hath Aid of the King, and ſo the King is in a manner Party. 25 *E.* 3. 39. Neither is a *Niſi prius* to be granted, if any of the Parties may have Prejudice by it. *Roll. Trial*, 629, *Q. pl.* 2.

If the Juſtices *de Niſi prius* die before the Day in Bank, yet the Record ſhall be received from the Clerk of Aſſize, without a *Certiorari*, or other Form of Entry but the antient Form.

Certification of Verdicts.

Alſo in that Caſe a *Certiorari* may be directed to the Executors or Adminiſtrators of the Juſtices, to certify the Record. *Dy.* 4. 5 *Ph. & Mar.* 163. 55. *Roll.* Tit. *Trial*, 629. *S. pl.* 1, 2.

They have no Power to increaſe Damages, nor allow or diſallow Protections, nor to allow a Plea of Excommengement in the Plaintiff. But they may record the Protection and the Default; and this ſhall be allowed or diſallowed in *B. Roll, Trial*, 630.

What Things the Juſtices of *Niſi prius* may do.

They may demand the Jurors upon a *Peine*, they may amerce Jurors, and puniſh a Treſpaſs done in their Preſence, which is in Deſpite of the King, and for this make Proceſs, and may fine Offenders. *Ibid.*

Jurors *ſur peine fine.*

In

In Ejectment the Defendant may plead at the Aſſizes, that the Plaintiff hath entered into Parcel of the Land mentioned in the Declaration *puis le darrein Continuance*, and the Juſtices of *Niſi prius* may accept this Plea, for it is in their Election; for if they perceive the Plea is dilatory, they may refuſe it, for it is at their Diſcretion. Sir *Hugh Brown*'s Caſe, *in Scaccario, Mich.* 8 *Jac. Roll.* Tit. *Trial*, 630. Plea *puis darrein Continuance.*

If eleven Jurors be ſworn, and the twelfth is challenged, and the Jurors cannot agree in the Challenge; for ten affirm the Challenge, and the other denies it; although the Party which did not take the Challenge, will not agree that the eleven ſworn ſhall have another to them in lieu of him that is challenged, yet the Court may do this. *Roll. Trial*, 675. *Y. pl.* 1. The Power of the Judge upon Diſagreement or other Matter. Challenge.

If a Challenge be taken to the Array before any Juror is ſworn, and Triors be choſen, who cannot agree, yet they ſhall not be commanded in Cuſtody, becauſe they never were ſworn upon the Principal. But the Court may diſcharge them and chuſe others. *Ibid. pl.* 2. Jurors diſcharged.

If there be three Triors who will not agree, the Court cannot take the Verdict of two, and command the other to Priſon. The ſame Law in Caſe of a Verdict upon an Iſſue. *Ibid. pl.* 2.

Where fourteen Jurors are impanell'd for the King, the Judge cannot diſcharge any of them after they are ſworn, if not, that they will not agree with their Companions. *Ibid.*

If the Jury ſay, upon Demand of the Court, that they are agreed, and afterwards when they are oppoſed, they ſay the contrary in any Matter, they may be amerced for this. *Roll.* Tit. *Trial*, 675. Amercement.

And

Niſi prius, why ſo called.

And now ſince the *Niſi prius* (for ſo it is called, becauſe the Word *Prius* is before *Venerint* in the *Diſtringas*, *&c.* which was not ſo in the *Venire facias* upon the Statute of *W.* 2. *cap.* 30. before rehearſed) muſt not be in the *Venire facias*, becauſe the Names of the Jurors are to be returned to the Court, before the granting of the *Niſi prius*; therefore the *Niſi prius* is now in the *Habeas Corpora* and *Diſtringas*. And if the Sheriff return not a Panel of the Jurors upon the *Venire facias*, there ſhall be no *Niſi prius* upon the *Tales*, until a Panel be returned, 27 *H.* 6. *f.* 10. 1 *H.* 5. *f.* 11. which brings me again to ſpeak of the *Tales*.

No *Niſi prius* before the *Venire facias* returned.

After Verdicts, received of *Niſi prius*, and Writs of *habeas Corpora Jurat.* being loſt by Mr. *Jacomb* the late Aſſociate; Rule for Defendant and *Jacomb* to ſhew Cauſe why new Records and Writs ſhould not be made out agreeable to the old, and Verdicts returned according to the finding of the Jury, made abſolute, no Cauſe being ſhewn to the contrary. *T.* 27 *&* 28 *Geo.* 2. *Laſſiter* againſt *Harvey*. *Supplement to Barnes's Notes* 54.

If the Record of *Niſi prius* agrees with the Declaration, a Variation from the Iſſue is not material. 2 *Stra.* 1131.

The *Tales* at Common Law.

A *Tales* is a Supply of ſuch Men, as were impanelled upon the Return of the *Venire facias*, grantable when enough of the principal Panel to make a Jury do not appear; or if a full Jury do appear, yet if ſo many are challenged, that the Reſidue will not make a Jury, then a *Tales* may be granted. And this at the Common Law was by Writs of *Decem tales*, *octo tales*, *&c.* (out of the King's Courts) one of them after another, as there was need, until there

there was a full Jury: But now by the Statutes of 35 *H.* 8. 6. 4 & 5 *P.* & *M.* 7. 5 *Eliz.* 25. and 14 *Eliz.* 9.

The Juſtices of Aſſize and *Niſi prius*, at the Requeſt of Plaintiff or Demandant, Defendant or Tenant, or of the Proſecutor *tam quam*, (if two, more, or but one of the principal Panel appear at the *Niſi prius*) may preſently cauſe a Supply to be made of ſo many Men as are wanting, of them that are there preſent ſtanding about the Court; and thereupon the very Act is called a *Tales de circumſtantibus*. (*a*)

Tales by Statute.

Note, the Difference between *Tales* at Common Law, and *Tales* by the Statute; the firſt called only [*Tales*] the ſecond [*Tales de circumſtantibus*] the laſt of which cannot be granted at a Trial at Bar, which is a Trial at Common Law; for there it muſt be only [*Tales*] by Writ annexed to the *Venire facias*. But *Tales de circumſtantibus* is given by Statute to Trials by Aſſize and *Niſi prius*, *per Stat.* 35 *H.* 8. 6. Yet ſuch a *Tales* to an Indictment in *Wales* was out of that Statute, and helped by the 5 *Eliz.* *c.* 25.

If the Iſſue be to be tried by two counties, and one full Inqueſt appear of one county, but the Inqueſt remain for Default of Jurors of the other County, a *Tales* ſhall be awarded to the County where the Default is, not to the other. *Roll. Trial*, 671. *M. pl.* 1.

Tales, in what Caſes it ſhall be granted.

(*a*) A *Tales de circumſtantibus* is in ſome Meaſure taken away, or rendered uſeleſs, by the late Statute for regulating of Juries, 3 *Geo.* 2. *c.* 25. though it is ſaid to have been held by *Raym.* Chief Juſtice, *Trin.* 5 *Geo.* 2. That this Statute doth not exclude a *Tales*, but that it may ſtill be granted upon ſpecial Juries. *Vin. Trial*, 313.

If a Juror die after he is impanelled, a *Tales* ſhall iſſue, not a *Venire facias*. *Ibid. pl.* 2.

What Perſons may have a *Tales*.

Upon a *Pluries Diſtringas* three only appear, the Plaintiff prays another *Diſtringas*, without praying a *Tales*, yet if the Defendant prays a *Tales*, the Court ought to grant it. *Dy.* 20 *El.* 359. 2. adjudged.

In what Caſes.

A *Tales* ſhall be granted in an *Attaint*, if all the Grand Jury make Default. *Roll. Trial*, 671. *O. pl.* 1. And it may be awarded in *Treaſon*, where the King is Party, by Virtue of the Statute 4 & 5 *P. & M. c.* 7. though not without a Warrant from the Attorney General, or an expreſs Aſſignment from the Court before which the Inqueſt is taken. *Vin. Trial*, 311, 316.

At what Time.

It cannot be granted at the Day of the Return of the *Venire facias*. *Rolle ſupra. pl.* 2.

If the *Venire facias* be good, and the *Habeas Corpora* ill, if the Panel be affirmed, yet the *Tales* is void, for in Effect there is only a *Venire facias* returned, and then no *Tales*. *Ibid. P. pl.* 1.

Tales with a Proviſo.

If the Defendant hath a *Habeas Corpora* with a Proviſo, yet the *Tales* ought not to be granted with a Proviſo, at the Defendant's Requeſt, before a Default in the Requeſt of a *Tales* in the Plaintiff. *Ibid.* 672.

At Common Law before the Statute, by Cuſtom of a Court, a *Tales de circumſtantibus* might be granted, for this is a good Cuſtom. *Dubitatur*, *Roll.* Tit. *Trial*, 672.

Treſpaſs *quare clauſum fregit*, Verdict for Plaintiff; Error *in Cam. Scacc'*. The Error inſiſted on was, that but one of the principal Panel appeared at the Aſſizes; upon which, at the Plaintiff's Requeſt, a Panel of *Tales de circumſtantibus*

cumſtantibus was returned by the Sheriff; the Title of it was, *Nomina decem talium*, &c. and eleven were returned: This was held well within the Statute 35 *H.* 8. *c.* 6. and that though there appeared but one of the principal Panel, a *Tales might* be prayed. 10 *Coke* 102.

If great Perſons are concerned, and by their labouring the Jury doth not appear, and *Tales* Men are prepared for their Turn, and there is a great Tumult *de circumſtantibus*; the Juſtices of their Diſcretion may deny a *Tales*, and adjourn in Bank, notwithſtanding the Statute. The principal Panel muſt ſtand, or elſe there can be no *Tales*. *Tales* denied.

If the Bailiff of the Franchiſe anſwer, that there be not ſufficient of his Bailiwick, the Juſtices may award a *Tales de circumſtantibus* to be returned by the Sheriff.

If two Coroners or Eſliſors return the Panel, one of them cannot return the *Tales*, &c.

If the Defendant ſue the Writ of *Niſi prius* by Proviſo, yet the Plaintiff may have a *Tales*, &c.

The Sheriff may return twenty-four, forty, or any Number upon the *Tales de circumſtantibus*. And it may be prayed by Attorney (although the Statute doth not mention an Attorney) as well as in proper Perſon. The Vouchee in *Præcipe quod reddat* may pray a *Tales*, though he be neither a Plaintiff nor Demandant in the firſt Action. Attorney.

If there be three Plaintiffs in *Replevin*, &c. and one of them makes Default at the *Niſi prius*, the other two cannot pray a *Tales*; otherwiſe of two copartners.

Mayor and Commonalty in their proper Perſons cannot pray a *Tales*: A Biſhop or Abbot may.

Two Plaintiffs in Treſpaſs; and at the *Niſi prius* the Defendant ſhews a Record to the Court, by which it appears that one of the Plaintiffs was outlawed after the laſt Continuance, the other cannot pray a *Tales*.

The Sheriffs upon the *Tales de circumſtantibus*, may impanel a Prieſt or Deacon, if he hath ſufficient Freehold of Lay-Fee; but not an Infant, nor one of the Age of eighty Years.

What Perſons of the *Tales*.

He may impanel Coroners, Capital Miniſters of any Corporation, Foreſters, Men blind, mute, (if they have their Underſtanding, but not deaf Men) excommunicated Perſons, but not outlawed or attaint, not Aliens, nor Clerks attainted, nor Perſons attainted of falſe Verdicts.

Challenge.

The Coroners may put the Sheriff on the *Tales*.

It ſeems by the Statute, none of the Parties can challenge the Array of the *Tales*, but only to the Poll.

After a Challenge to the Poll tried, there ſhall be no other Challenge to the ſame Poll, for any Cauſe or Matter that is at the ſame Time.

In an Action of Treſpaſs for taking away the Plaintiff's Money, one of the *Tales* was challenged, becauſe he was a common Foſterer of Thieves, and dwelt in a ſuſpicious Place, and of ill Fame; and held a good Challenge.

For Challenges, ſee the Title *Challenge* at large.

What Iſſues ſhall be tried by *Tales de circumſtantibus*, ſee *William*'s Reading, *& hic cap.* 7.

But ſince none can come after the Reporter, obſerve with me his *Nota Lecteur* in his 10th *Report* 104. That at Common Law, in

the granting of a *Tales* five Things are to be conſidered.

1. The Time of the granting, *&c.* thereof.
2. The Number of *Tales*.
3. The Order of them.
4. The Manner of Trial; that is, where by them with others, and where by them only.
5. The Quality of them is to be conſidered.

As to the firſt, four Things are likewiſe to be conſidered.

1. That the Time of granting them is upon Default of ſo many of the principal Panel, that there cannot be a full Inqueſt.

At *Wickham* Aſſizes in *Bucks*, 1684, Only one Juror appeared, who was challenged, but before he was ſet aſide, the Court granted a *Tales*, by *Mountague* Chief Baron.

2. That at the Time of granting them, the principal Array ſtand; for *Tales* are Words ſimilitudinary, and have Reference to the Reſemblance, which then ought to be *in eſſe*; and therefore if the Array be quaſhed, or all the Polls challenged and treited, no *Tales* ſhall be awarded, for then there are not *Quales*; but in ſuch a Caſe, a new *Venire facias* ſhall be awarded. But if at the Time of granting the *Tales*, the principal Panel ſtand, and afterwards is quaſhed, as aforeſaid, yet the *Tales* ſhall ſtand; for it ſufficeth if there were *Quales*, at the Time of granting the *Tales*.

3. It is to be obſerved, that he which is meerly Defendant, cannot pray a *Tales* till the Plaintiff hath made Default.

4. In ſome Caſes a *Tales* ſhall be granted after a full Jury appear and is ſworn; as if a Jury be charged, and afterwards before a Verdict given in Court, one of them die, a *Tales* ſhall be awarded, and no new *Venire facias*:

And ſo if any of the Jurors impanelled die before they appear, and this appears by the Sheriff's Return, the Panel ſhall not abate; but if there be need, a *Tales* ſhall be awarded. And the Time for Challenge and Trial of the *Tales*, is after the principal Panel is tried; and if the principal Panel be affirmed, the ſame Triors ſhall try the *Tales*; but if it be quaſhed, then the two Triors of the Principal ſhall not try the *Tales*.

As to the ſecond, to wit the Number, two Things are to be obſerved.

1. That in all Caſes the *Tales* ought to be under the Number of the Principal in the *Venire facias* (unleſs in Appeals) as in Attaint, under twenty-four; and in other Actions where the *Venire facias* is of twelve, under twelve. And the Reaſon wherefore more than the Number may be granted in Appeals of the Plaintiff's Part, is becauſe the Defendant may challenge peremptorily; and if Default be in the Plaintiff, then the Defendant may pray a *Tales*, and the Reaſon is *in favorem vitæ*, and that he may expedite and free himſelf from Vexation, and the Queſtion of his Life, for fear that his Witneſſes ſhould die.

2. That the Number ought always to be certain, as ten, eight, ſix, or four, *&c.* But now by the Statute of 35 *H.* 8. a *Tales de circumſtantibus* may be granted, as well of an uncertain as a certain Number, and that by Force of theſe Words in the Statute 35 *H.* 8. *So many*, &c. *as ſhall make a full Jury.* In *capital Caſes* a *Tales* may be granted for a *larger Number* than were in the principal Panel, as for 60, 40, or any other even Number, in order to prevent Delay, which may be occaſioned by peremptory

peremptory Challenges; and in this reſpect the Law differs from other Caſes in which the *Tales* muſt be for a *leſs Number* than the firſt Proceſs. *Vin. Trial*, 321.

As to the third, to wit, the Order, it is to be known, That always in every new *Tales*, the Number ſhall be diminiſhed, as if the firſt be ten, the ſecond ſhall be eight, and ſo always leſs. But if the *Tales* awarded be quaſhed by Challenge, you may have another of the ſame Number.

As to the fourth, to wit, the Manner of Trial, that is commonly by them with others; but by them only, when after the granting the *Tales*, the principal Panel is quaſhed, then the Trial ſhall be only by the *Tales*; or if the *Tales* do not amount to a full Inqueſt, another *Tales* to ſupply the former may be granted.

As to the fifth, to wit, the Quality of the *Tales*, they ought to be of the ſame Quality as the *Quales* are; and therefore if the firſt be *per medietatem Linguæ*, of Engliſh and Aliens, ſo ought the *Tales* to be; ſo if the Principal be out of a Franchiſe; ſo if the *Venire facias* be directed to the Coroners, ſo ought the *Tales*; and all Things which are required by Law in the *Quales* are required in the *Tales*, as you may read in the aforeſaid Statutes. *Vide Staundf. Pleas del Corone*, *f.* 155. 10 *Rep.* 105.

Therefore if the *Venire facias* be not *de medietat. linguæ*, the *Tales* cannot. 8 E. 4. 12.

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cauſe to Trial again, he may have a *Diſtringas*, *&c.* with a *decem Tales*.

By the Statute of 23 *H.* 8. *cap.* 3. If there be not enough ſufficient Freeholders as are required in an Attaint, in the County where ſuch

Attaint.

Attaint is taken, a *Tales* may be awarded into the Shire next adjoining.

Niſi prius amendable.

If the Tranſcript of the Record of the *Niſi prius* be miſtaken, and not warranted by the Rolls, for which Cauſe the Plaintiff becomes nonſuit, he may have a *Diſtringas de novo*, upon Motion to the Court, and the *Poſtea* ſhall not be recorded, *Cro.* 1 Part 204. *Palmer*'s Reports 378. For there is but a Tranſcript of the Record ſent to the Juſtices of *Niſi prius*.

Juſtices of *Niſi prius*, and Juſtices of Aſſize.

Firſt they were Juſtices of *Aſſize*, and therefore they retain that Name ſtill, though *Aſſizes* are very rarely brought; for this common Action of Ejectment hath ejected moſt real Actions, and ſo the *Aſſize* is almoſt out of Uſe.

Tales Men, their Sufficiency.

It ſhall be lawful to return Perſons upon the *Tales* within any County of *England*, who ſhall have 5 *l. per Annum* above Reprizes; and in *Wales* 3 *l. per Annum.* 4 & 5 *W.* & *M. c.* 24.

Tales Men to be returned out of other Panels.

Where there ſhall be Occaſion for any *Tales*, the Sheriff or other Miniſter, to whom it ſhall appertain to return the *Tales* Men, ſhall return Freeholders or Copyholders of the County where the Cauſe is to be tried, who ſhall be returned upon ſome other Panel to ſerve at the ſame Aſſizes, and then attending to ſerve upon ſuch *Tales*; and the Plaintiff or Defendant may have his Challenge to the Jurors ſo named, in ſuch Manner as if they had been impanelled upon the *Venire:* And the Judge of Aſſize ſhall and may proceed to try the Iſſue with theſe *Tales* Men ſo newly added, as he might have done, if all the Jurors returned on the *Venire* had appeared: And in Caſe any Freeholder or Copyholder ſo returned on the *Tales*, being preſent at ſuch Return, ſhall refuſe to appear when called, or after Appearance ſhall wilfully withdraw himſelf,

Challenge to the *Tales*.

Perſon on the *Tales* with drawing himſelf, to be fined.

himself, the Judge of Assize who awarded such *Tales* may fine him. 7 & 8 *W.* 3. *cap.* 32.

Distringas with a Blank for the Cause of Action, amendable.

Bullock versus *Parsons*, *Pas.* 4 *Ann. B. R.* In Debt, after Verdict for the Plaintiff, Mr. *Eyre* moved in Arrest of Judgment, that the *Distringas* was with a Blank, and *Debiti* (the Cause of Action) omitted; so it was a *Distringas* in another Cause: On the other Side, it was urged to be as no *Distringas*, and aided by Verdict, and that it was amendable. *Hob.* 246. 2 *Cro.* 528. The Court made two Questions, first, Whether the Judge of *Nisi prius* had Authority to try this Issue? *Et per Holt* Ch. J. The Authority of the Judge of *Nisi Prius* is not by the *Distringas*, but by the Commission of Assize; for it is 13 *E.* 1. *c.* 30. which gives the Trial by *Nisi prius*, and by that Statute the Trial by *Nisi prius* is given before the Justices of Assize; and at first these Trials by *Nisi prius* were always had and made upon the *Venire facias*; and indeed the Clause of the *Nisi prius* is by 13 *E.* 1. *c.* 30. expressly ordered to be inserted in the *Venire facias*; and Trials by *Nisi prius* continued to be upon the *Venire facias* till 42 *Ed.* 3. *c.* 11. which requires that the Names of the Jurors be first returned into Court. By this Act two Inconveniencies were remedied; 1*st*, The Party might now be prepared to make his Challenges, the Panel being first returned into Court, which was not before. 2*dly*, The Defendant was prevented by this Means to cast an Essoin at *Nisi prius*, which was frequently used before; for by *Marlb. c.* 13. the Defendant was allowed one Essoin, and that after Issue joined upon the Return of the *Venire*: By Consequence, when that was returned at *Nisi prius*, he could essoin at *Nisi prius*; but now

Authority of a Judge of *Nisi prius* is by Commission of Assize.

now it is returned above, he muſt eſſoin above, and cannot now eſſoin at the Trial, becauſe the Trial is upon the *Diſtringas*, and not upon the *Venire*. 2*dly*, The Court held no *Diſtringas*, or the Want of a *Diſtringas*, to be aided by Verdict, but an ill *Diſtringas* was not; and remembered a Caſe, wherein *Saunders* of Counſel at the Bar, dropped the *Diſtringas* out of his Hand, that he might want a *Diſtringas*, which would be aided, and not keep and ſhew an ill one, which would be naught. Alſo they held it amendable, and gave Judgment *pro Quer'*. *Salk.* 454.

Where there is no *Diſtringas*, it is aided by Verdict, but an ill *Diſtringas* is not.

Judge of *Niſi prius* may receive a *Non-Proſ.* at the Aſſizes.

Greeves verſus *Rolls*, *Paſ.* 4 *Ann. B. R.* The Judge of *Niſi prius* may receive a *Non Proſ.* at the Aſſizes; ſo it was held by *two* Judges, and *that* Judgment was affirmed in the Houſe of Lords againſt the Opinion of *Holt*, Ch. J. For before the Statute of *York*, the Juſtices of *Niſi prius* had no Power to record a Nonſuit or Default in the Country, and conſequently have no Power now to enter a *Non Proſ.* which is not within that Statute. At Common Law they could not record a *Non Proſ.* Default or Nonſuit. *Nota*; The principal Caſe was Ejectment againſt ſeveral, who all entered into the Rule of Leaſe, Entry and Ouſter; at the Aſſizes ſome would confeſs, and others would not: The Plaintiff, as to thoſe who would not confeſs, entered a *Non Proſ.* and went on againſt the others, and recovered; upon this a Rule was made, That in like Caſes the Plaintiff ſhould go on againſt thoſe who would confeſs, and as to thoſe who would not, ſhould be nonſuit; but that the Cauſe of the Nonſuit ſhould be expreſſed in the Record, *viz.* becauſe thoſe Defendants would not confeſs Leaſe, Entry and Ouſter; and upon the Return of the

In Ejectment againſt ſeveral, if ſome confeſs Leaſe, Entry, *&c.* and others do not, the Plaintiff may go on as to the former, and be nonſuit as to the latter.

Poſtea, the Court would be informed what Lands were in the Poſſeſſion of thoſe Defendants, that the Judgment might be entered againſt the caſual Ejector as to them. 2 *Salk.* 456, 457.

Where Defendants ſever in Plea, Plaintiff may enter a *Non Prof.* againſt one any Time before the Record ſent down.

It was agreed in the arguing of this Cauſe, That where there are ſeveral Defendants, and they ſever in Plea, whereupon Iſſue is joined, that the Plaintiff may enter a *Non Prof.* as to one Defendant at any Time before the Record is ſent down to be tried at *Niſi prius*. *Ibid.* 457.

No Repleader awarded after Default at *Niſi prius*.

Staple verſus *Hayden*, *Trin.* 2 *Ann.* Where the Defendant makes Default at *Niſi prius*, no Judgment can be given for him, nor Repleader awarded: If the Tenant make Default in a real Action, a *Grand Cape* is awarded; and upon the Return of it, if the Demandant inſiſts upon the Default, he muſt have Judgment final; but the Demandant may wave the Default, and take an Appearance upon the *Grand Cape*, and that is regular, becauſe the Tenant comes in by Proceſs: And ſo it is of a Default on a *Petit Cape*, but in a perſonal Action there is no Proceſs to bring the Party into Court again: Alſo the Day of *Niſi Prius* not being the ſame with the Day in Bank, a Default at *Niſi prius* cannot be waved at the Day in Bank; and the Bar was cautioned never to make Defaults at *Niſi prius*, becauſe no Judgment could be given for the Defendant afterwards. 1 *Salk.* 216, 217.

Default may be waved in real Actions, not in perſonal.

While the Jury were a ſwearing, Defendant's Counſel called for the Record, and finding a Miſtake in it, ſaid, they would make no Defence. Plaintiff's Counſel upon this, to avoid a Nonſuit, and to ſave the Coſts, refuſed to pray

pray a *Tales*; and tho' Twelve had been ſworn, yet there having been no actual Prayer of a *Tales*, the Cauſe was ſuffered to remain for want of Jurors. 1 *Str.* 707.

CHAP. VI.

Of the Number of the Jurors (*a*), *and why the Sheriff returns Twenty-four, though the* Venire Facias *mentions but Twelve: If he returns more or leſs, no Error, and of the Number Twelve. And when the Trial ſhall be* per primer *Jurors. And of Inqueſts of Office; and when to remain* pro defectu Juratorum. [*As to the Number of Jurors* now *to be returned, ſee Stat.* 3 G. 2. *c.* 25. *at the End of this Chapter.*]

Of the Number Twelve.

NOW for the *Quales*; and theſe you ſee for Number muſt be Twelve, by the Common Law. *Doct. & Stud. fol.* 14. For Quality, *liberos & legales Homines.* And firſt of their Number Twelve: And this Number is no leſs eſteemed of by our Law than by Holy Writ. If the twelve Apoſtles on their twelve Thrones, muſt try us in our eternal State, good Reaſon hath the Law to appoint the Number of Twelve to try our Temporal. The Tribes of *Iſrael* were Twelve, the Patriarchs were

Joſh. 4.
Geneſ. 49.

(*a*) Juror (*Jurator*) is one of thoſe Perſons that are ſworn on a Jury; and the Law requires the Return of able and ſufficient *Jurors.* 16 & 17 *Car.* 2.

Twelve,

Twelve, and *Solomon*'s Officers were Twelve (*a*). 1 *Kings* 4. 7. *Vide* Sir *Henry Spelman verb.* (*Jurata*). Therefore not only Matters of Fact were tried by Twelve, but of ancient Times, twelve Judges were to try Matters in Law, in the *Exchequer-Chamber*, and there were twelve Counſellors of State for Matters of State; and he that wageth his Law muſt have eleven others with him who believe he ſays true. And the Law is ſo preciſe in this Number of Twelve, that if the Trial be by more or leſs, it is a Miſtrial; but in Inqueſts of Office (*b*), as a Writ of Waſte, there leſs than Twelve may ſerve. *F. N. B.* 107. *c.* And in Writs to inquire of Damages, the juſt Number of Twelve is not requiſite, for they may be over or under; and ſo it was reſolved, *Trin.* 1651. *B. R. Abbot* verſus *Holt*, that the Sheriff ought (in Writs of Inquiry) to ſummon Twelve by their Names, yet Damages aſſeſſed by a leſs Number is ſufficient; and in the Writ to the Sheriff, *quod ipſe inquirat per Sacramentum proborum hominum*, omitting (*duodecim*) it is good and uſual.

Finch 400, 484.

Inqueſts of Office. *Vide hic, cap.* 13.

And in a Writ of Inquiry of Waſte by thirteen it was holden good. 1 *Cro.* 414.

(*a*) The Privilege of Trial by *Jury*, is of great Antiquity in this Kingdom; ſome Writers will have it that *Juries* were in Uſe among the *Britains*; but it is more probable that this Trial was introduced by the *Saxons:* Yet ſome ſay, that we had our Trials by *Jury* from the *Greeks*; (the firſt Trial of a *Jury* by Twelve being in *Greece.*) By the Laws of King *Ethelred*, it is apparent that *Juries* were in Uſe many Years before the Conqueſt; and they are as it were incorporated with our Conſtitution, being the moſt valuable Part of it; for without them no Man's Life can be impeached, (unleſs it be by Parliament) and no one's Liberty or Property ought to be taken from him.

(*b*) *Plow. Com in Proœmio.* Twelve Judges. Leſs than Twelve in Inqueſts of Office.

In

In Dower, if the Tenant come at the *Grand Cape*, and say he was always ready to render Dower, and Issue is taken upon this, although Seisin of the Land be presently awarded, yet no Inquest of Office, but the Jury upon the Trial of the Issue shall assess Damages. 22 *E.* 3. 15. *Roll. Trial*, 595.

In what Cases there shall be an Inquest of Office, and in what not; see *Roll.* Tit. *Trial*, 595.

Why the Sheriff returns twenty-four.

And although there can be no Verdict but by Twelve, yet by ancient Course and Usage, (which, as the Lord *Coke* tells us, makes the Law in this Case. 1 *Inst.* 155.) the Sheriff is to return Twenty-four. And this is for Expedition of Justice; for if Twelve should only be returned, no Man should have a full Jury appear or sworn, in respect of Challenges, without a *Tales*, which would be a great Delay of Trials; and for this Cause at Common Law, it was Error if the Sheriff returned less than Twenty-four. But now it is remedied by the Statute of 18 *Eliz.* as a Mis-return. See *Cro.* 1 Part 223. *Lib.* 5. 36, 37. By which Books it appears, that if the Sheriff return but Twenty-three, *&c.* it shall not vitiate the Verdict of Twelve, no, though a full Jury do not appear, so that the Trial is by ten of the principal Panel, and two of the *Tales*, notwithstanding *Maynard*'s Opinion to the contrary, and *Cro.* 3 Part 587. After Verdict it was alledged in Arrest of Judgment, that neither upon the *Venire facias* or *Distringas* there was not made any Return; and it was held by the whole Court good Cause for the staying the Judgment, and that it was not aided by the Statutes. The Sheriffs used to summon above twenty-four, *scil. effrænatam*

If the Sheriff return less than twenty-four, it is no Error.

Keble 1 Part 310.

natam multitudinem; but now they are prohibited by Statute to ſummon above twenty-four. *Weſt.* 2. *cap.* 38. 2 *Inſt.* 447. Muſt not return above twenty-four.

If the Iſſue be to be tried by two Counties, if but one of one County appear, although a full Inqueſt appear of the other, yet this ſhall remain for Default, becauſe they cannot try that which is in another County. There ought to be ſix of each County. And ſo of one Inqueſt out of a Franchiſe, and another out of the Guildable; and ſo of two Panels returned in an Aſſize by ſeveral Bailiffs of Franchiſes to try one Iſſue, and one Panel makes Default, the Iſſue ſhall not be tried by the other Panel, for the Jurors in one Franchiſe cannot make the View in another Franchiſe. *Roll.* Tit. *Trial*, 673. In what Caſes the Inqueſt ſhall remain for Default of Jurors. Two Counties.

If the Jury be of two Counties, or two Panels of the Guildable and Franchiſe, *&c.* they ſhall be ſworn interchangeably, firſt one of one, then another of the other. The Manner of Swearing the Jurors.

If a *Juryman* appear, and refuſe to be ſworn, or refuſe to give any Verdict, if he endeavours to impoſe upon the Court, or is guilty of any Miſbehaviour after Departure from the Bar, he may be fined, and Attachment iſſue againſt him. 2 *Hawk. P. C.* 145, 146.

If the Jury go at large until another Day after they are ſworn, and the Roll of the Entry be not in Court, they may be ſworn anew. *Roll.* Tit. *Trial*, 674.

To make a Jury in a Writ of Right, which is called the Grand Aſſize, there muſt be ſixteen, *ſcil.* four Knights, and twelve others; the Jury in Attaint, called the Grand Jury, muſt be twenty-four. *Finch* 412, and 485. But if the Iſſue be upon a Matter out of the Point of the Where there muſt be 16 and 24 in a Jury.

the Attaint, as upon a Plea of *Nontenure*, the Trial ſhall be by twelve *Juratores*. 21 *E.* 3. 13.

There may be more than ſixteen in a Writ of Right. *Roll.* Tit. *Trial*, 674.

Where Witneſſes join with the Jury, the Number is uncertain.

When Proceſs uſed to be made out againſt the Witneſſes *in Carta nominat.* to join with the Jury in Trial of the Deed, as was uſed before the Statute of 12 *E.* 3. *c.* 2. (*his Teſtibus*) being then Part of the Deed, then the Number was uncertain, according as the Number of Witneſſes were in the Deed: Wherefore no Attait lay, if the Deed were affirmed, becauſe more than twelve joined in the Verdict. But otherwiſe if the Deed was not found, becauſe Witneſſes cannot prove a Negative. *F. N. B.* 106. *h.* 1 *Inſt.* 6. 2 *Inſt.* 130, *&c.*

Cannot prove a Negative.

Juror departs and another ſworn by Conſent.

If twelve are ſworn, and one of them depart by Conſent (*a*), another of the Panel may be ſworn, and join with the other Eleven in the Verdict. 11 *H.* 6. 13.

A Jury of Six.

It hath been frequently held, that a Cuſtom in an inferior Court to try by ſix Jurors is void; and that though ſuch Cuſtom is uſed in *Wales*, yet that is by Force of the Stat. 34 *H.* 8. which appoints that ſuch Trials may be by Six only, where the Cuſtom hath been ſo. *Cro. Car.* 259. 1 *Sid.* 233. 3 *Keb.* 326. See Stat. 3 *G.* 2. *c.* 25. *ſect.* 9.

Per primer Jurors. Vide hic, cap. 4.

If the Record be pleaded in Bar of the Aſſize, and the Party that pleads ſays, the ſame Tenements were put in View to the former Jurors: If the Plaintiff ſaith *nient compriſe*, this

(*a*) After a Juror is ſworn, he may not go from the Bar until the Evidence is given, for any Cauſe whatſoever, without Leave of the Court; and with Leave he muſt have a Keeper with him. 2 *Lill.* 123, 127.

ſhall

ſhall be tried *per primer Jurors & auters.* 13 *H.* 4. 10. *Roll. Trial*, 592. *F. pl.* 1.

So if the Tenant ſaith, that theſe Lands are not the ſame Lands before recovered, this ſhall be tried *per primer Jurors & auters*, 22 *Aſſiſe* 16. and ſo in a *Rediſſeiſin. Ibid.* 593. *pl.* 2.

So in an Aſſize, if the Defendant plead a Recovery *per* View *de Jurors* in another Aſſize, this ſhall not be tried by the Aſſize, but *per primer Jurors.* 13 *H.* 4. 10. *Ibid. pl.* 3.

And if at the Return of the former Jurors and others, all the former Jurors appear, the Trial ſhall be by them only; but if any do not appear, they ſhall be ſupplied by the others. 40 *Aſſiſe* 4. *Ibid. pl.* 4.

In ſuch Caſes where the Plaintiff is not to recover the Land, nor to defeat the former Judgment, if *nient compriſe* be pleaded, upon a Recovery pleaded, this may be tried by other than the former Jurors. 1 *H.* 6. 5. *Ibid. pl.* 6.

As in Treſpaſs for Trees cut, the Defendant pleads, that he recovered before in an Aſſize, the ſame Land where, *&c.* and cut, *&c.* The Plaintiff ſays, this Land, where, *&c.* was not put in View, and ſo *nient compriſe.* This ſhall not be tried by the firſt Jurors, but by others, becauſe this Action doth not defeat the former Judgment, nor recover any Thing but Damages. *Note* the Difference, 1 *H.* 6. 5. Where the Trial ſhall be *per primer Jurors*, and where by them and *Auters*, and where only *per auters.* See *Roll.* Tit. *Trial*, 593. *pl.* 6.

Is a Writ granted for the re-examining of a Matter paſſed by *Aſſiſe* before Juſtices: And this is uſed where a Man appearing by his Bailiff to an *Aſſize* brought by another, hath loſt the Day; and having ſomething more to plead

Certificate of Aſſize of Novel Diſſeiſin.

for himſelf, which the Bailiff did not, or might not plead for him, deſires a further Examination of the Cauſe, either before the ſame Juſtices, or others, and obtains Letters Patent to them to that Effect; whereupon he brings a Writ to the Sheriff to call both the Party for whom the *Aſſiſe* paſſed, and the Jury that was impanelled on the ſame, before the ſaid Juſtices at a certain Day and Place, when the ſame is to be examined: And it is called a *Certificate*, becauſe therein mention is made to the Sheriff, that upon the Party's Complaint of the defective Examination, as to the *Aſſiſe* paſſed, the King had directed his Letters Patent to the Juſtices for the better *certifying* of themſelves, whether all the Points of the ſaid *Aſſiſe* were duly examined. *Reg. Orig.* 200. *F. N. B.* 181. *Bracton*, *lib.* 4. *c.* 13. *Horn's Mirror*, *lib.* 3.

Muſt be twelve Jurors in a Writ of Inquiry.

A Judgment out of an inferior Court was reverſed; becauſe, being by Default, the Inquiry of Damages was only by two Jurors, and Cuſtom alledged to warrant it; and it was reſolved by the Court, that there cannot be leſs than twelve, though the Writ of Inquiry ſaith only, *per Sacramentum proborum & legalium hominum*, and not *duodecim*, as in a *Venire*. 1 *Vent.* 113.

Rules in ſtriking a ſpecial Jury.

Trin. 8 *W.* 3. A Rule was made in *B. R.* That when the Maſter is to ſtrike a Jury, he ſhould give Notice to the Attornies on both Sides to be preſent; and if one comes, and the other does not, he that appears ſhall ſtrike out Twelve, and the Maſter ſhall ſtrike out other Twelve for him that is abſent. *Salkeld* 405.

If it be not expreſſed in the Rule, that the Maſter ſhall ſtrike forty-eight, and each of the Parties

Parties ſhall ſtrike out Twelve, the Maſter is to ſtrike twenty-four; and the Parties have no Liberty to ſtrike out any. *Salk.* 405.

On a Motion granted for Leave to amend an Information in a Caſe of *Miſdemeanor*, Leave was likewiſe granted for the Maſter to ſtrike a Jury by Conſent; *ſed contra* in *capital Caſes*, for then the Priſoner would loſe his Challenges.

On Motion for a *ſpecial Jury* in a Caſe of Murder, it was denied *per Cur'*; for in Caſes of Treaſon or Felony, there can be no ſpecial Jury, and the Party hath a right of challenging twenty without Cauſe; in Caſes of ſpecial Juries there are forty-eight brought before the Maſter, who ſtrikes off twenty-four, in which Caſe there cannot be a Rule for a good Jury.

If there be no legal Exceptions againſt the Sheriff, the Court cannot ſlip him, and order another to ſtrike a ſpecial Jury *without Conſent* of the Parties to be tried at the Aſſizes; but if there be any Objection againſt him, and that made out by Affidavit, a ſpecial Jury *may* then be ſtruck by the Maſter without Conſent; ſo to try a Cauſe at Bar, a ſpecial Jury may be ſtruck without Conſent. *Vin. Trial*, 301.

Formerly the Maſter and Under-Sheriff (who attends with the Book of Freeholders Names), had each a Guinea a ſide from the Plaintiff and Defendant; but ſee the Stat. 3 *G.* 2. *cap.* 25. by which the whole Charge lies on the Party applying for a ſpecial Jury.

By 3 *G.* 2. *c.* 25. *ſect.* 15. reciting, 'That 'whereas ſome Doubt hath been conceived 'touching the Power of his Majeſty's Courts of 'Law at *Weſtminſter*, to appoint Juries to be 'ſtruck before the Clerk of the Crown, Maſter 'of the Office, Prothonotaries, or other pro-

'per Officer of such respective Courts, for the 'Trial of Issues depending in the said Courts, 'without the Consent of the Prosecutor or Par- 'ties concerned in the Prosecution or Suit then 'depending, unless such Issues are to be tried 'at the Bar of the same Courts, Be it de- 'clared and enacted by the Authority aforesaid, 'That it shall and may be lawful to and for his 'Majesty's Courts of *King's Bench*, *Common* 'Pleas, and *Exchequer*, at *Westminster* respec- 'tively, upon Motion made on Behalf of his 'Majesty, his Heirs, or Successors, or on the 'Motion of any Prosecutor or Defendant in 'any Indictment or Information for any Mis- 'demeanor, or Information in the Nature of 'a *Quo Warranto* depending or to be brought 'or prosecuted in the said Court of *King's* 'Bench, or in any Information depending or to 'be brought or prosecuted in the said Court of 'Exchequer, or on the Motion of any Plaintiff 'or Plaintiffs, Defendant or Defendants in any 'Action, Cause, or Suit whatsoever, depend- 'ing or to be brought and carried on in the 'said Courts of *King's Bench*, *Common Pleas*, 'and *Exchequer*, or in any of them; and the 'said Courts are hereby respectively authorized 'and required, upon Motion as aforesaid, in 'any of the Cases beforementioned, to order and 'appoint a Jury to be struck, before the proper 'Officer of each respective Court, for the Trial 'of any Issue joined in any of the said Cases, and 'triable by a jury of twelve Men, in such Man- 'ner as special Juries have been, and are usually 'struck in such Courts respectively, upon Trials 'at Bar had in the said Courts; which said 'Jury so struck as aforesaid shall be the Jury 'returned for the Trial of the said Issue.

'And

And *Sect.* 16. It is further enacted, 'That 'the Perſon or Party, who ſhall apply for ſuch 'Jury to be ſtruck as aforeſaid, ſhall bear and 'pay the Fees for the Striking ſuch Jury, and 'ſhall not have any Allowance for the ſame, 'upon Taxation of Coſts.'

Sect. 17. Provided, 'That where any Special 'Jury ſhall be ordered by Rule of any of the 'ſaid Courts to be ſtruck by the proper Officer 'of ſuch Court, in the Manner aforeſaid, in 'any Cauſe ariſing in any City, or County of a 'City or Town, the Sheriff or Sheriffs, or Un-'der Sheriff of ſuch City, or County of a City 'or Town, ſhall be ordered by ſuch Rule to 'bring, or cauſe to be brought before the ſaid 'Officer, the Books or Liſts of Perſons quali-'fied to ſerve on Juries within the ſame, out 'of which Juries ought to be returned by ſuch 'Sheriff or Sheriffs, in like Manner, as the 'Freeholders Book hath been uſually ordered to 'be brought, in order to the Striking of Juries 'for Trials at the Bar, in Cauſes ariſing in 'Counties at large; and in every ſuch Caſe the 'Jury ſhall be taken and ſtruck out of ſuch 'Books or Liſts reſpectively.'

Since our Author wrote the following Stat. of 3 *G.* 2. *c.* 25, hath been made, relating to the Number of Jurors to be returned: And here we ſhall firſt obſerve that,

At Common Law in *Civil* Cauſes, it ſeems the Sheriff might have returned above 24 if he pleaſed; and therefore by the Stat. *Weſt.* 2. *c.* 38. (*a*) It is recited, That whereas Sheriffs were uſed to ſummon an unreaſonable Multitude of

(*a*) Note; this Stat. extends not to Jurors returned for trial of *Criminal* Perſons. *Kel.* 16.

Jurors, to the Grievance of the People; it is ordained, that from thenceforth, in one *Assize*, no more shall be returned than 24. See *Godb.* 370. 2 *Keb.* 310.

And now by the above mentioned Stat. of the 3 *G.* 2. *c.* 25. *sect.* 8. It is enacted, 'That 'every Sheriff or other Officer, to whom the 'Return of the *Venire facias juratores*, or other 'Process for the trial of Causes before Justices 'of Assize or *Nisi prius*, in any County in (*b*) *Eng-* 'land, doth or shall belong, shall, upon his Re- 'turn of every such Writ of *Venire facias* (un- 'less in Causes intended to be tried at Bar, or in 'Cases where a Special Jury shall be struck by 'Order or Rule of Court) annex a Panel to the 'said Writ, containing the Christian and Sir- 'names, Additions and Places of Abode of a 'competent Number of Jurors, named in such 'Lists as qualified to serve on Juries, the Names 'of the same Persons to be inserted in the Panel 'annexed to every *Venire facias*, for the Trial 'of all Issues at the same Assizes in each respec- 'tive County; which Number of Jurors shall 'be not less than Forty-eight in any County, 'nor more than Seventy-two, without direc- 'tion of the Judges appointed to go the Cir- 'cuit, and sit as Judges of Assize or *Nisi prius*, 'in such County, or one of them, who are re- 'spectively hereby impowered and required, if 'he or they see Cause, by Order under his or 'their respective Hand or Hands, to direct a

(*b*) By the ninth *Sect.* of this Stat. the Number in *Wales* for the Grand Sessions not to be less than *Ten*, nor more than *Fifteen* out of every Hundred, and to be summoned eight Days before. By the 18th *Sect.* the Number in the Counties Palatine, the same as in other Parts of *England*, and to be summoned 14 Days before.

'greater

'greater or leſſer Number, and then ſuch Number as ſhall be ſo directed ſhall be the Number to ſerve on ſuch Jury; and that the Writs of *Habeas corpora juratorum* or *Diſtringas*, ſubſequent to ſuch Writ of *Venire facias juratores*, need not have inſerted in the Bodies of ſuch reſpective Writs the Names of all the Perſons contained in ſuch Panel; but it ſhall be ſufficient to inſert in the Mandatory part of ſuch Writs reſpectively, *Corpora ſeparalium perſonarum in panello huic brevi annexo nominatarum*, or Words of the like Import, and to annex to ſuch Writs reſpectively Panels, containing the ſame Names, as were returned in the Panel to ſuch *Venire facias*, with their Additions and Places of Abode, that the Parties concerned in any ſuch Trials may have timely Notice of the Jurors, who are to ſerve at the next Aſſizes, in order to make their Challenges to them, if there be Cauſe; and that for the making the Returns and Panels aforeſaid, and annexing the ſame to the reſpective Writs, no other Fee or Fees ſhall be taken, than what are now allowed by Law to be taken, for the Return of the like Writs and Panels annexed to the ſame; and that the Perſons named in ſuch Panels ſhall be ſummoned to ſerve on Juries at the then next Aſſizes or Seſſions of *Niſi prius*, for the reſpective Counties to be named in ſuch Writs and no other.'

CHAP. VII.

Who may be Jurors, who not; who exempted, and of their Quality and Sufficiency.

Jurors muſt be *Liberi*. Vide 2 Inſt. fol. 27.

SO much for their Number; next their Quality is to be conſidered; and for this the Writ imforms you who they are to be, 1. *Liberos*, that is, Freemen, not Villeins or Aliens; and that not only Freemen, and not Bond; but alſo thoſe that have ſuch Freedom of Mind that they ſtand indifferent, without any Obligation of Affinity, Intereſt, or any other Relation whatſoever, to either Party: Sometimes the Word *Probos* inſtead of *Liberos* is attributed to them; they are both good Epithets for a Juror, but I eſteem the firſt as moſt ſignificant.

1 Inſt. 155. Fortescue, cap. 25.

Saunders *againſt* Leek.

Error of a Judgment in the *Marſhalſea*, the *Venire facias* being *Probos & Legales*, not ſaying as the Regiſter is, *Liberos homines, &c. ſed non allocatur*; Judgment affirmed. *Keble* 1 Part 563.

Legales.

2. They ought to be *Legales*, not outlawed, nor ſuch as have loſt *Liberam Legem*, or become infamous, as Recreants, Perſons attainted of Felony, falſe Verdict, Conſpiracy, Perjury, Premunire or Forgery upon the Statute of 5 *Eliz. cap.* 14. and not upon the Statute of 1 *H.* 5. 3. Not ſuch as have had Judgment to loſe their Ears, ſtand on the Pillory or Tumbrel, or have been ſtigmatized or branded, nor Infidels; neither can any ſuch be Witneſſes. 1 *Inſt.* 6.

3. *Homines*;

3. *Homines*; they ought to be Men, (yet there ſhall be a Jury of Women to try if a Woman be *Enſeint*, upon the Writ *de ventre inſpiciendo*): But what Kind of Men theſe ought to be, is worthy to be known. And for this ſome Men are exempted from ſerving on Juries, in Reſpect of their Dignity, as Barons, and all above them in Degree. Many are exempted by the Writ *de non ponendis in Aſſiſs*, *F. N. B.* 166. as aged Perſons Seventy Years old, and many others are exempted, as Clerks, Tenants in Ancient Demeſne, Miniſters of the Foreſt, (out of the Foreſt) Coroners, Infants under the Age of fourteen Years, Officers of the Sheriff, ſick decrepit Men, and ſuch as are exempted by the King's Charter: Yet in a Grand Aſſize, Perambulation, Attaint, and ſome other Special Caſes, ſuch Men as are not exempted by Reaſon of their Dignity, ſhall be forced to ſerve, notwithſtanding their Exemption in other Caſes. See *Dalton*'s Office of Sheriffs, *fol.* 121. 52 *H.* 3. *cap.* 14. 2 *Inſt.* 127, 130, 378, 447, and 561. Counſellors, Attornies, Clerks, and other Miniſters of the King's Courts, are not to ſerve on Juries; but I find one Jury made of Attornies of the *Common Bench* and *Exchequer*, in a Caſe brought upon a Bill in the *Exchequer*, by Sir *Thomas Seton*, Juſtice, againſt *Luce C.* for calling of him Traitor in the Preſence of the Treaſurer and Barons of the *Exchequer*. And this Jury of Attornies gave the Juſtice one hundred Marks Damages. 30 *Aſſiſe* 19.

A Jury of Women.

Exemption of Juries.

Who are to be exempted from Juries.

A Jury of Attornies.

The Court frequently order a Jury of Merchants to try Merchants Affairs.

If the Charter of Exemption be, that he ſhall not be put *in Juratis*, *Aſſiſis ſeu recognitionibus aliquibus*, yet this ſhall not excuſe in a Writ of Right

In what Caſes they ſhall be diſcharged by Charter.

Right upon Trial of the Grand Aſſize, for he comes not in, in this Caſe, by ſuch Proceſs as in other Caſes, but is choſen by the Oath of the four Chevaliers, and now he is in a Manner Judge in this Caſe. 39 *E.* 3. 15. *Roll. Trial*, 632. *B. pl.* 1.

Neither ſhall it exempt him in an Attaint, nor in a Grand Inqueſt, to inquire of Felonies, *&c.* becauſe the Charter hath not this Clauſe. *Licet tangat nos & hæredes noſtros.* 42 *Aſſ.* 5. *Ibid. pl.* 3.

At what Time, and how the Charter ſhall be allowed.

At the *Niſi prius* the Bailiffs of a Vill may ſhew a Charter, that to try Contracts, *&c.* within the Vill, the Inqueſt ſhall be all of Denizens, without Foreigners, and this ſhall be allowed, and the Foreigners ſhall be ouſted. 29 *Aſſ.* 15. *Ibid.* 633.

So may the Burgeſſes who are put upon a Jury out of the Borough, if they have ſuch a Charter. 30 *Aſſ.* 1.

Allowed without Writ.

If a Man be impanelled of an Inqueſt, and ſhew ſuch Charter of Exemption of the ſame King in whoſe Time he ſhews it, this ought to be allowed without Writ. 39 *E.* 3. 15. *Roll. Ibid.* 633.

The Jurors ought to come in Perſon, and claim Privilege, the Sheriff cannot return it. 2 *Inſt.* 130.

Viſne.

4. *De vicinet. de C.* It is not ſufficient that they dwell in the County, but they are to be of the Neighbourhood, nay *le plus procheins* to the Place of the Fact, as by *Artic. ſuper Chartas cap.* 9. it is appointed: They muſt be moſt near, moſt ſufficient, and leaſt ſuſpicious. *Ibid.* as I ſhall ſhew hereafter.

Sufficiency of Jurors.

5. *Quorum quilibet habeat quatuor librat' terræ, tenement' vel reddit' per Annum ad minus*;

nus; this is their Sufficiency, where the Debt or Damages (or both together, 1 *Inſt.* 272.) amount to 40 Marks or above. This Sufficiency of Jurors in other Caſes of leſſer Moment, is ſtill left to the Diſcretion of the Juſtices, *Forteſcue*, *cap.* 25. who (Experience tells us) never require Jurors under 4*l. per Annum*, according to the Statute of 27 *Eliz. cap.* 6. before which, Men of 40*s. per Annum* ſerved; but neither this nor the Statute of 35 *H.* 8. extend to Juries in Cities, Towns corporate, or other privileged Places, or in the twelve Shires of *Wales*; ſo that there they ſhall be returned, as before they lawfully might have been. For the Jurors Sufficiency in Attaints, ſee the Statutes 15 *H.* 6. 5. 18 *H.* 6. 2. and 18 *H.* 8. 3.

As to the Statute 35 *H.* 8. 6. the Trial ordained by that Statute, lies only in ſuch Actions, which have their ordinary Trial by twelve Men, and not more; and by Writ of *Niſi prius*; and this only in thoſe Actions in which the Proceſs of *Vinire facias*, *Habeas corpora* and *Diſtingas* lies againſt the Jurors, and in no other Actions.

And although the Statute only mentions the Trial of Iſſues joined in the King's Courts, commonly holden at *Weſtminſter*; and if the Action be commenced in any other Court, yet if the Iſſue be joined in any of the Courts at *Weſtminſter*, it ſhall be tried according to the ſaid Statute; and ſo if thoſe Courts are removed from *Weſtminſter*, the Iſſues joined in them ſhall be tried as the ſaid Statute directs.

And the Words, *betwixt Party and Party*, ſhall only be intended of common Perſons, and not betwixt the King and any other Perſon, nor when the King joins with any other Perſon, in any

any Action, which by the Releaſe or Pardon, may be diſcharged before the Action brought.

In an Information of Intruſion by the Queen, a Juror was challenged for Inſufficiency of Freehold; he had but to the Value of 15*s.* a Year. It was adjudged that the Statutes *H.* 5. and 27 *Eliz.* extend only betwixt Party and Party, and not to the Queen; and if he had any Freehold, it was ſufficient, but ſome Freehold he muſt have. *Cro. Eliz.* 38, 413. Sir *Chriſtopher Blunt*'s Caſe.

An Action on the Caſe was commenced in *Chancery*, and on Iſſue joined there, a *Venire* iſſued, *quorum quilibet habet quatuor Libras ad minus*, to try it in *B. R.* and on Trial it was found for Plaintiff; and now it was moved in Arreſt of Judgment, that this *Venire* was wrong, and that the Statute 27 *Eliz. c.* 6. only extends to Iſſues joined in *B. R. B. C.* or *Exchequer:* But it was held well, and that the Statute extended to all Iſſues tried in *B. R.* wherever they were joined.

What is neceſſary to be known, in Reſpect of *Tales de circumſtantibus, &c.* See *Williams* his Readings upon this Statute lately come out in Print; in which there are many ingenious Speculations; but becauſe they do not come often in Practice, and the Project of this Treatiſe is only to contain Matters uſeful for Practiſers; that the Book may not ſwell too big, I omit them, referring you to the Reading itſelf. See afterwards in the Chapter of Challenges.

It is the general Courſe of the World to eſteem Men according to their Eſtates; for *Quantum quiſque ſua nummorum ſervat in arca, Tantum habet & fidei:* And ſure I am, the

Makers of this Law had Cauſe enough to do ſo in this Caſe; for if Men of leſs Eſtates ſhould ſerve on Juries, ſuch Fellows would only be ſhifted into Inqueſts, as had more need to be relieved by the 8 *d.* than Diſcretion to ſift out the Truth of the Fact: 'Tis hard to get an unbiaſſed Jury now; but ſurely leſs Rewards would ſooner bribe and byaſs meaner Men than theſe. Therefore, leſt Poverty or Neceſſity ſhould tempt, every Juror muſt have 4 *l. per Annum* as aforeſaid, of Freehold, out of Ancient Demeſne. And the Court may, in Matters of great Conſequence, direct a *Venire facias* for a Jury above 4 *l. per Annum* a-piece, but not under. *Cro.* 2 Part 672. But in ſuch Caſes (every one knows) the Court commonly orders the Prothonotary to chuſe forty-eight, out of the Sheriff's Book of Freeholders, of the moſt ſubſtantial Men in the County, and the Parties ſtrike out twelve a-piece, then the Sheriff returns the reſt.

Jurors of above 4 *l. per Annum.*

Note; In former Times, when Eſtates of Inheritance were in few Men's Hands, ſuch as had 40 *s. per Annum* were found ſufficient Men to ſerve on Juries. After, Eſtates of Inheritance coming in greater Meaſure to the Vulgar, it was by the ſaid Statute 27 *Eliz. cap.* 6. made 4 *l. per Annum*; and the ſame Reaſon improving in late Times, it was thought conſiſting with the Wiſdom of a Parliament to raiſe it to 20 *l. per Annum*, to the End Men's Eſtates might be truſted in the Judgment of more knowing Judges of the Fact, when they become litigious; and this was by an Act of 16 & 17 *Car.* 2. *cap.* 3. which being but a Probationer, and to continue but for three Years, and from thence to the End of the next Seſſion of Parliament, it is expired.

Jurors of 20 *l. per Annum.*

Such

Such a Man who hath Land, Rent, Office, or other Profit *apprender*, out of Ancient Demeſne, to the clear yearly Value of 4 *l.* of which he may have an Aſſiſe, he hath ſufficient Freehold to be a Juror. *Vide* the ſaid Reading where you may know what Eſtate is ſufficient to make a Man a Juror. See the Chapter of *Challenges* in this work.

But now by the Statute 4 & 5 *Will. & Mariæ*, *c.* 24. *ſect.* 15. all Jurors (other than Strangers *per medietat. linguæ*) returned upon Trial of Iſſues joined in the *King's Bench*, *Common Pleas* or *Exchequer*, or before Juſtices of Aſſize or *Niſi prius*, *Oyer* and *Terminer*, Gaol-Delivery, or General Quarter-Seſſions of the Peace, ſhall have in their own Name or in Truſt, within the ſame County, 10 *l.* a Year, above Repriſes, of Freehold or Copyhold Land, or in Ancient Demeſne, or in Rents in Fee-ſimple, Fee-tail, or for their own or ſome other Perſon's Life; and in *Wales* 6 *l.* a Year. If any be returned of leſſer Eſtate, he may be diſcharged by Challenge, or upon his Oath; nor ſhall a Juror's Iſſues be ſaved, but by Order of Court, for reaſonable Cauſe proved upon Oath.

The Sheriff, Coroner or other Miniſter returning any Perſon of leſſer Eſtate, ſhall forfeit 5 *l.* to their Majeſties, for every Perſon ſo returned.

They muſt be ſummoned ſix Days before the Day of their Appearance, and none to take a Reward to excuſe a Juror's Appearance, on Pain to forfeit 10 *l.* to their Majeſties.

This Act extends not to Cities, Boroughs, and Towns corporate.

Tales Men in *England* ſhall have 5 *l.* a Year, in *Wales* 3 *l.* a Year.

No

No Fee or Reward shall be taken by any Persons whatsoever, upon the Account of any *Tales* returned, upon Pain of 10*l.* The one Moiety to the Prosecutor, the other to his Majesty.

No Writ *de non ponendis in Assisis & Juratis* shall be granted, unless upon Oath that the Suggestions are true.

This Act to be in Force three Years, from the first of *May* 1693, and is since continued on.

Jurors must not be of Affinity to the Party.

Et qui nec D. E. *nec* F. G. *aliqua affinitate attingunt*; the Law is very cautelous, in not leading Men into Temptation: Therefore, lest Kindred and Affinity should wrong the Conscience to help a Friend, our *Jurors* must not be related to any of the Parties; and for this Reason likewise the Statutes provide, that no Man of Law shall ride Judge of Assize or Gaol-Delivery in his own Country. 8 *R.* 2. 2. 33 *H.* 8. *cap.* 24. [but this is since altered by Stat.] And the contrary hereof was often done by a *Non obstante*; but how consistent with Integrity or Prudence, they know best who procure it to be done. But because most Things concerning the Quality and Sufficiency of Jurors, will come more properly under the Title *Challenge*, I will refer you thither.

Jurors in Corporate Towns need not have Freehold.

Rex versus *Higgins*, *B. R.* The Cause came to be tried at Bar, and a Challenge was made to the Jury in Behalf of the Defendants, for that the Jurymen were not Freeholders: And the Court said it had been held, That for Juries within Corporate Towns, the Statutes that have been made, requiring that Jurymen should have so much Freehold, do not extend to them; and though to maintain the Challenge, it was said, by the Common Law that Jurymen were to be Freeholders;

Freeholders; the Court over-rul'd the Challenge. 1 *Vent.* 366.

In Waſte the Jury ſhall have the View.

If in a Writ of Waſte, the Defendant plead no Waſte done, and it appears upon Examination upon a *Voire dire*, That ſix of the Jury have view'd the Place waſted, it is ſufficient; if it appears upon Examination that none of the Jurors have had the View, the Trial ſhall be ſtay'd: If Waſte be aſſign'd in ſeveral Places, and of any of them the Jury have not had the View, they may find *Nul Waſte fait. Lutwich* 1558, 1559.

King may exempt Perſons from ſerving on Juries.

A Grant from the King to diſcharge one from ſerving on Juries is good, but a Grant to diſcharge a whole County is void. 1 *Siderfin* 127.

Grand Jury muſt find purſuant to the Indictment.

Rex verſus *Paine*. The Court held it was not in the Power of the Grand Jury to find one guilty of Manſlaughter on an Indictment of Murder. *Sid.* 230.

A whole City may be exempted from ſerving on Juries.

Rex verſus *Percival & al.* It was there held, That the King might grant the Privilege to a City, that they ſhould be exempt from ſerving on Juries *out of their own City*. But it was agreed by all, That by ſuch Grant they would not be exempt from ſerving in this Court *B. R.* unleſs there were an expreſs Clauſe in the Charter, that they ſhould not ſerve *coram ipſo Rege*. *Sid.* 343.

Apothecaries exempted.

Every Perſon uſing and exerciſing the Art of an Apothecary in the City of *London*, or within ſeven Miles thereof, being free of the Society of Apothecaries in the ſaid City, and who ſhall have been duly examined and approved, *&c.* for ſo long Time as he ſhall exerciſe the ſaid Myſtery, and no longer, ſhall be exempted from

from ſerving on any Jury or Inqueſt. 6 *W.* 3. *cap.* 4.

Other Perſons exerciſing the ſaid Art of an Apothecary in any other Parts of this Kingdom, who have ſerved as Apprentices ſeven Years, according to the Statute of 5 *Eliz.* ſhall likewiſe be exempted from ſerving on Juries, for ſo long Time as they ſhall uſe and exerciſe the ſaid Art, unleſs ſuch Perſon voluntarily conſent to ſerve. *Ibid.*

All Seamen alſo duly regiſtred are exempted from ſerving on Juries by 7 & 8 *W.* 3. *cap.* 21. Seamen exempted.

All Conſtables and Headboroughs ſhall yearly at the General Quarter-Seſſions of the Peace, in the Week after *Michaelmas*, return and give a true Liſt in Writing of the Names and Abodes of all Perſons within the reſpective Places for which they ſerve, qualified to ſerve on Juries, between the Age of twenty-one and ſeventy Years, which Liſt they ſhall deliver to the Juſtices: And they ſhall cauſe the Clerk of the Peace to deliver a Duplicate thereof to the Sheriff of the County or his Deputy, before the firſt of *January* next following, and cauſe the ſaid Liſt to be fairly entred in a Book, and kept among the Records of the Seſſions: And no Sheriff ſhall impanel or return any Perſon to ſerve on any Jury at the Aſſizes, Gaol-Delivery or Seſſions of the Peace, who ſhall not be named in the ſaid Liſt. Any Conſtable or Headborough failing to make ſuch Return as aforeſaid, to forfeit 5*l.* to the King. 7 & 8 *W.* 3. *cap.* 32.

Liſts of Jurors to be exhibited by the Conſtables, to the Juſtices at their Quarter-Seſſions See Chap. 8. p.

No other to be returned by the Sheriff.

Every Summons of Perſons qualified to ſerve on Juries, ſhall be made by the Sheriff or his Officer, at leaſt ſix Days before the Day of Appearance, ſhewing to the Perſon the Warrant under the Seal of the Office, wherein he is no-

How to be ſummoned.

minated to ſerve; and in caſe ſuch Juror to be ſummoned, be abſent from his uſual Habitation, a Note in Writing under the Hand of ſuch Officer to that Effect, ſhall be left at his Dwelling-houſe with ſome Perſon there inhabiting. *Ibid.*

The Sheriff is excuſable if he return any in the Conſtables Liſts, though not qualified.

The Return to the Seſſions ſhall be a good Excuſe to the Sheriff, if he ſummon one who is not qualified, and if an Action be brought thereupon, the Sheriff may plead the General Iſſue, and give this Act in Evidence; and if the Plaintiff be nonſuit, *&c.* he ſhall pay treble Coſts. And if the Sheriff, his Bailiff, or Deputy, ſhall ſummon any Freeholder or Copyholder, otherwiſe than as aforeſaid, or neglect his or their Duty, or excuſe any Perſon for Favour or Reward, or allow of any Exemption to any Perſon under the Age of ſeventy Years; ſuch Sheriff, his Deputy or Bailiff, ſhall forfeit the Sum of 20 *l.* to the Party grieved, or to whomſoever ſhall ſue for the ſame, in any Court of Record at *Weſtminſter*. *Ibid.*

Penalty of Sheriff on his Miſbehaviour.

Quakers are incapable of ſerving on Juries. 7 & 8 *W.* 3. *cap.* 34.

Special Writs where the Jury ſhall have the View.

The Courts of *Weſtminſter* are impowered to order ſpecial Writs of *Diſtringas* or *Habeas Corpora*, to cauſe ſix or more of the firſt twelve Jurors, to have the Matters in Queſtion ſhewn them, by two Perſons in the Writs named and appointed by the Court; and the Sheriff ſhall return the View. 4 & 5 *Ann. cap.* 16.

For the Qualifications of Jurors as regulated by 3 *G.* 2. *c.* 25. and 4 *G.* 2. *c.* 7. ſee the next Chapter towards the End.

CHAP.

CHAP. VIII.

Concerning the Viſne, *or Place from whence the Jury ſhall come*, &c.

Vicinetum is derived of this Word *Vicinus*, and ſignifieth Neighbourhood, or a Place near at Hand, or a Neighbour Place, where the Queſtion about the Fact is moved. And the moſt general Rule (ſaith *Coke* 1 *Inſt.* 125,) is, That every Trial ſhall be out of that Town, Pariſh or Hamlet, or Place known out of the Town, *&c.* within the Record, within which the Matter of Fact iſſuable is alledged, which is moſt certain and neareſt thereunto, the Inhabitants whereof may have the better and more certain Knowledge of the Fact. Viſne.

Some Place muſt be alledged ſo as an Iſſue may be taken; the Omiſſion of it is incurable.

As in Debt for Rent, and *Nil debet* pleaded, and Iſſue join'd, at the Day of *Niſi prius*, the Defendant pleaded a Releaſe after the laſt Continuance, but named no Place *where* the Plaintiff releaſed, ſo as no Iſſue could be taken; and upon a Demurrer the Plaintiff had Judgment, for the Fault was incurable.

So in Error on a Judgment in Debt, pleading a Releaſe of Errors without laying a *Venue* is ill; and the Plea then amounts to a Confeſſion of the Errors.

So an Award pleaded in Bar, without ſaying *where* the Award was made, was ruled ill upon Demurrer.

Conſideration *executory* is traverſable, and therefore a *Venue* muſt be laid: But in Covenant

againſt one as Aſſignee a *Venue* is not neceſſary to be laid, for an Aſſignment is always intended to be made on the Lands aſſign'd.

If a Place be alledged and no County where it lies, no Iſſue can be upon it; as in a *Scire facias* upon a Recognizance on a Breach of the Peace. The Breach was aſſigned in a *Ville*, but no County mentioned, and the Jury at the Bar were diſcharged: But in ſome Caſes the *Ville* alledged ſhall be intended in the County where the Action is brought, as a Fact laid in *Middleſex* as done at *Iſlington*; in this Caſe *Iſlington* ſhall be intended to be in *Middleſex*, for it is the Giſt of the Action: Indeed, if the Place mentioned be *collateral* to the Iſſue, it is then neceſſary to ſhew in *what* County it lies; it ſhall otherwiſe be intended to lie in any County.

So Act of Compoſition, and a Compoſition in purſuance, being pleaded in Bar to Debt upon a Bond, without reciting the Act, or laying a *Venue* for the Compoſition, was adjudged ill; and Judgment for the Plaintiff.

But if Coverture be pleaded *to a Writ* it needs no *Venue*, but may be tried where the Writ is brought, and the Defendant muſt ſhew and prove the Coverture. 'Tis the ſame in pleading *Infancy*.

So *Alien Enemy* pleaded in *Abatement* needs no *Venue*, and ſo adjudged on Demurrer; for the Plaintiff might have replied generally *born in England*, but if pleaded *in Bar* a *Venue* is neceſſary; and this is the true difference, and according to *Coke*, though the Precedents be both Ways.

The Want of a *Venue* may be aided *by pleading over*; as in Treſpaſs, where the Defendant pleads Performance of an Award, but lays no *Venue*, and the Plaintiff replies a ſubſequent Award

ward, on which the Defendant tenders an Iſſue, this is aided by the pleading over.

So in Debt upon a Bond, and the Defendant pleads a Releaſe, this admits the Bond and aids the want of a *Venue*. *Vin. Trial*, 91, 92, 93.

And if a Thing be alledged in *D.* the *Venue* muſt not be of *D.* but *de vicineto de D.* for otherwiſe the Neighbourhood would be excluded. *Roll.* Tit. *Trial*, 622. *pl.* 33.

And if the Fact be alledged *in quadam platea vocat.* Kingſtreet, *in parochia ſanctæ Margaretæ in Civitate Weſtm. in Com. Midd.* in this Caſe the *Viſne* cannot come out of *Platea*, becauſe it is neither Town, Pariſh, Hamlet, nor Place out of the Neighbourhood, whereof a Jury may come by Law; but in this Caſe it ſhall not come out of *Weſtminſter*, but out of the Pariſh of St. *Margaret*, becauſe this is the moſt certain. But therein alſo it is to be noted, that if it had been alledged in *Kingſtreet*, in the Pariſh of St. *Margaret* in the County of *Middleſex*, then ſhould it have come out of *Kingſtreet*; for then ſhould *Kingſtreet* have been eſteem'd in Law a Town: For whenſoever a Place is alledged generally in Pleading, (without ſome Addition to declare the contrary, as in this Caſe it is) it ſhall be taken for a Town. 1 Inſt. 125. Pariſh. Town.

And albeit *Parochia* generally alledged, is a Place incertain, and may (as we ſee by Experience) include ſeveral Towns; yet if a Matter be alledged *in Parochia*, it ſhall be intended in Law, that it containeth no more Towns than one, unleſs the Party do ſhew the contrary. But when a Pariſh is alledged within a City, there without Queſtion the *Viſne* ſhall come out of the Pariſh, for that is more certain than the City. *Parochia.* 1 Inſt. 125. b. Moor 559.

If a Matter be pleaded done *apud Bradford in Forfield in Parochia de Belbroughton*, the *Venue*

ſhall be of *Belbroughton*, and not of *Bradford*; for *Belbroughton* ſhall be intended to be a Town, and one Town ſhall not be intended to be in another Town, and therefore *Bradford* ſhall not be intended to be a Town. *Roll.* Tit. *Trial*, 619. *pl.* 1.

The *Venue* ſhall ever be of the moſt certain Place; but a Writ of *Inquiry of Damages* is not of any *Viſne* certain, it only ſays *per ſacramentum proborum & legalium Hominum*, &c. *Vin. Trial* 90. and where there is a Judgment upon a *Nil dicit* the want of a *Venue* will not ſet it aſide, for the Inquiry is not to be of any Thing beſides Damages, which by any Jurors in the County may be inquired of. *Ibm.* 93.

So Matters touching the *Perſon*, as Privilege of Attorney, may be pleaded without a *Venue*. *Ibm.*

It is ſufficient if the *Venue* be laid at a Place which has Reference to the County in the Margin; for ſince by Act of Parliament the *Venire* is *de corpore Com.* it is not neceſſary to lay any particular Place in the County.

Where no *Venue* is laid in the Body of the Declaration, the Reference then muſt be had to the Margin; but where a *Venue* is laid in the Body of the Declaration, the County in the Margin ſhall not vitiate, it ſhall help, but not hurt. *Vin. Trial*, 94.

In a *Quo warranto* for uſing a Warren in *D.* if the Defendant ſay the Vill *D.* is Parcel of the Manor of *S.* and preſcribes to have a Warren within the ſaid Manor and Demeſnes thereof,

Ibid. 619. pl. 6. the *Venire facias* ſhall be of the Manor; for the Manor by Intendment is more large than the Vill. If the *Viſne* be *de D.* and *S.* and the *Ve-*

Ibid. 620. pl. 8. *nire facias* be *de D. S.* and *V.* this is not good, becauſe it is too large. If *apud Burgum de Plimouth*,

mouth, the *Venue* may be *de Plimouth* generally. If *apud Villam de Cambridge in Warda Fori*, and the *Venire facias* is *de Villa & Warda prædict.* this is helped by the Statute of *Jeofails*. *Ibid.* 621. *pl.* 21, 22.

If the Place be out of a Town, the *Venue* ſhall not be of the next Town, but from the Place itſelf, but the Sheriff ought to return the Jury *de plus prochein Ville*. *Ibid. pl.* 24.

In Ejectment of Land *in Foreſta de Kevennon in Com. S.* the *Venue* may be *de vicineto Foreſtæ*, for this is a Place known; and by Intendment, becauſe the Defendant hath not pleaded in Abatement, that this is out of any Pariſh or Vill. *Ibid. pl.* 26.

In inferior Courts within Boroughs, the *Venire facias* is *quod Venire facias* 12 *liberos Burgenſes Burgi & Parochiæ de* B. although there may be twelve Burgeſſes which are not Inhabitants. *Roll.* Tit. *Trial*, 622. *pl.* 34.

The *Venue* ſhall follow the Iſſue. *Vide Poſtea.*

In Treſpaſs and Battery in *London*, if the Defendant juſtifie in *Midd.* by Proceſs out of the *Marſhal*'s Court, that he arreſted him, and becauſe the Plaintiff would not go with him, he beat him, *&c. Abſque hoc*, that he is guilty in *London vel alibi* out of the Juriſdiction of the Court. To which the Plaintiff replies, and acknowledges the Arreſt, but ſays, that he beat him at *London*, *de injuria ſua propria abſque tali cauſa*, and Iſſue upon this; this ſhall be tried in *London*, and the Words, *abſque tali cauſa*, are void, the Iſſue being joined upon a Place certain, *ſcil. London:* Affirmed in a Writ of Error. *Roll. ib.* 624. But the Court ſaid, that he might have demurred upon this Plea.

De Corpore Comitatus. 1 Inſt. 125. b. Manor.

If a Treſpaſs be alledged in *D.* and *Nul tiel Ville* is pleaded, the Jury ſhall come *de Corpore Comitatus.* But if it be alledged in *S.* and *D.* and *Nul tiel Ville de D.* is pleaded, the Jury ſhall come out *de vicineto de S.* for that is the more certain. So if a Matter be alledged within a Manor, the Jury ſhall come *de vicineto Manerii.* But if the Manor be alledged within a Town, it ſhall come out of the Town, becauſe that is moſt certain, for the Manor may extend into divers Towns. And all theſe Points were reſolved by all the Judges of *England*, upon Conference between them, in the Caſe of *John Arundel*, Eſq; indicted for the Death of *William Parker.* 6 *Co.* 14.

De Corpore Com'.

Where there may be a ſpecial *Viſne*, the Trial ſhall never be *de Corpore Comitatus.* *Leon.* 1 Part 109.

If a *Venire facias* ought to be of one or more Vills in certain, in a County, and this is awarded *de Corpore Comitatus*; this ſeems to be aided by the Statute of 21 *Jac.* of *Jeofails*; for this comes from the Vills from whence it ought to come, and from others, inaſmuch as it comes *de Corpore Comitatus*, *Roll.* Tit. *Trial*, 618. and many other Caſes concerning this Matter.

But in Ejectment of Land, called *S.* and no Place is named where the Land lies, and a *Venire* is awarded *de Corpore Com.* this is erroneous, and too large, becauſe there is a Place certain where the Land lies, and yet is not named in the *Nar.* as it ought to be. *Hob.* 121. *Roll. Trial*, 617. *pl.* 15.

But if the Iſſue be taken upon a Title of Dignity, and whether *Chivaler* or not, this may come *de Corpore Comitatus*, becauſe that the *Place where*, &c. is not material. *Ibid. pl.* 16.

If

If *A.* by the Name of *A.* of the County of *Hampſhire*, bring a *Scire facias* upon a Recognizance in *Chancery* in the County of *Middleſex* againſt *B.* and the Defendant plead that the Plaintiff is outlawed by the Name of *A.* in the County of *Cheſter*; to which the Plaintiff replies, that he is not *una & eadem Perſona*, this may be tried by the Jury of the County of *Middleſex*, where the Writ is brought. *Roll. Trial*, 617. *pl.* 14.

In a *Quare Impedit* for the Church *de Uſelbee*, and the Defendant pleads that there is no ſuch Church, the *Venue* ſhall not come *de Corpore Comitatus*, but *de vicineto de Uſelbee*; for this is a Place known, and it is intended the Church of *Uſelbee* is within the *Ville* of *Uſelbee*. *Hob.* 325. *Roll. Trial*, 616. *pl.* 7.

In a Prohibition, if the Parties be at Iſſue upon a Cuſtom *de non decimando* of Wood in the Wild of *Suſſex*, the *Venire facias* ſhall be *de Corpore Comitatus*; for the Wild is not ſuch a Place, whereof the Court may have Conuſance to be ſufficient to have a Jury to come from this, for the Wild is a Wood by Intendment. *Hob.* 348. *Roll. Trial*, 617. *E. pl.* 2. Wild.

In a real Action where the Demandant demands Lands in one County, as Heir to his Father, and alledges his Birth in another County, if it be denied that he is Heir, it ſhall not be tried where the Birth is alledged, but where the Land lieth; for there the Law preſumes it ſhall be beſt known who is Heir. But if the Defendant make himſelf Heir to a Woman (for that is the ſurer and more certain Side, and the Mother is certain, when perhaps the Father is incertain) it ſhall be tried where the Birth is alledged, Heir tried where the Land lies, where not. 1 Inſt. 125. b. Cro. 3 Part 818. Cro. 2 Part 303.

ledged, because they have more certain Conusance, than where the Land lieth.

Bastardy. 1 Inst. 125. b.

And so it is where Bastardy is alledged, the Trial shall be in like Case, *Mutatis mutandis*.

Non Concessit, where the Land lies. *Ibid.*

If a Man plead the King's Letters Patent, and the other Party plead *Non concessit*, it shall not be tried where the Letters bear Date; for they cannot be denied, but where the Land lieth.

Visne, of what Places. *Ibid.*

Every Trial must come out of the Neighbourhood of a Castle, Manor, Town or Hamlet, or Place known out of a Castle, Manor, Town, or Hamlet, as some Forest, and the like, as before.

Venire facias may be of a Forest, *Burgo*, *Castro*, *Warda*, *Parco*, &c. but not of a Leet. *Balleva*, Market, Walk, &c. not *de lieu conus*, without alledging this to be out of a Vill or Parish. *Siderfin* 326. But after Verdict helped by the new Statute 16, 17 *Car.* 2. *c.* 8.

Where the Writ is brought at Common Law.

Every Plea concerning the Person, Plaintiff, &c. shall be tried where the Writ is brought. 1 *Inst.* 125. *b.*

When the Matter alledged extendeth into a Place at the Common Law, and a Place within a Franchise, it shall be tried at the Common Law. 1 *Inst.* 125.

Matters done beyond Sea, how triable in *England*. *Vide cap.* 10.

Matters done beyond Sea may be tried in *England*, and therefore a Bond made beyond Sea may be alledged to be made in any Place in *England*, if it bear Date in no Place; but if there be a Place, as at *Bourdeaux* in *France*, then it shall be alledged to be made *in quodam loco vocat. Bourdeaux* in *France*, in *Islington*, in the County of *Middlesex*, and from thence shall come the Jury, 1 *Inst.* 261. *Latch* 4 & 5. So if the Tenant plead that the Demandant is an Alien, born under the Obedience of the *French* King, and

Rob. 2 Part 315.

and out of the Allegiance of the King of *England*; the Demandant may reply, that he was born at such a Place in *England*, within the King's Legiance, and hereupon a Jury of twelve Men shall be charged, and if they have sufficient Evidence that he was born in *France*, or in any other Place out of the Realm, then shall they find that he was born out of the King's Legiance. And if they have sufficient Evidence that he was born in *England*, or *Ireland*, or *Guernsey*, or *Jersey*, or elsewhere within the King's Obedience, they shall find that he was born within the King's Legiance. And this hath ever been the Pleading and Manner of Trial in that Case. So of other Things done beyond Sea, the adverse Party may alledge them to be done at such a Place in *England*, from whence the Jury shall come, and in a special Verdict, they may find the Things done beyond Sea. *Ibid.* & *Lib.* 7. 26.

Things done beyond Sea.

Lib. 7. 26.

So when Part of the Act is done in *England*, and Part out of the Realm, that Part that is to be performed out of the Realm, if Issue be taken thereupon, shall be tried here by twelve Men, and they shall come out of the Place where the Writ or Action is brought. *Ibid. Lib.* 6. 48.

Part without the Realm, and Part within.

Error, for that Judgment was given by Default against the Defendant, being an Infant; Issue was taken that he was of full Age. And *Godfrey* moved, whether the Trial should be in *Norfolk* where the Land was, or in *Middlesex*, where the Action was brought? And the Court held, That it should be tried in the County where the Land lay; and *Tanfield* said, it was so adjudged in the *King's Bench*, between *Throgmorton* and *Burfind*. *Cro.* 3 Part 818.

Full Age tried where the Land lies.

Error

Error on a Judgment in Dower at the Grand Seſſions in *Brecon* was aſſigned, for that the Tenant being under Age appeared by Attorney; and it was alledged that he was within Age at *Abergavenny* in the County of *Monmouth*; and Iſſue being thereon joined, it was tried by a Jury *de Vicineto de Abergavenny*, and found for Plaintiff in Error. It was moved in Arreſt of Judgment, that this was a Miſ-trial; for being in a real Action, this Iſſue ought to have been tried where the Land lay; but held well by all the Court; for the Alledging him to be within Age at *Abergavenny*, is the ſame as alledging a Commorancy there; and a Difference was taken between where the Title depended on the Nonage, in which Caſe it ſhould be tried where the Land lay, and where the Infancy is pleaded as a Matter *de hors*, as in the preſent Caſe. *Jones*, *T.* 170, 171.

Local Actions. Queſtions of Title of Land (except by ſpecial Order of the Judges in ſome Caſes) are to be tried in the County where the Land lies; for the Law is, that all real and mixt Actions, as Waſte, Ejectment, Treſpaſs for breaking the Cloſe, cutting down Trees, ſpoiling the Corn, Graſs, *&c.* and Debt upon an Eſcape, *&c.* muſt be laid in the County where the Cauſe of Action aroſe, or where the Land lies. If an Action be brought againſt an Officer for a Matter relating to the Execution of his Office, the Action muſt be laid in the proper County. But if the Officer, after his Authority is expired, abuſes the Party, or if he meets a Man and knocks him down, the Action of Treſpaſs and Aſſault is not confined to the *proper* County. 1 *Str.* 446.

Tranſitory Actions. Debt, Detinue, Annuity, Account, Actions of the Caſe, Battery, *&c.* are in their own Nature tranſitory,

tranſitory, and yet they ought to be laid and tried in their proper County where the Fact was done, unleſs the Court order the contrary, for ſome ſpecial Reaſons; and if they are laid out of the proper County, daily Practice tells us the Court may alter the *Venue*, upon *Affidavit* of the true Place of the Fact.

All *criminal* Matters are to be tried where the Offence is committed. Criminal Matters.

If the *Venue* ariſe in two Counties, the Jury upon two *Venire facias's* ſhall come from both, ſix out of one County, and ſix from the other. *Cro.* 3 Part 646. But by the Conſent of Parties, entered upon Record, it may be by five out of one, and ſeven from the other, as appears, *Cro.* 3 Part 171. where in *Replevin* the the Defendant avows for *Damage feaſant*; the Plaintiff by his Replication claims Common by Preſcription *in loco quo*, *&c.* being *Broadway* in the County of *Worceſter*, appurtenant to his Manor of *D.* in the County of *Glouceſter*, and Iſſue thereupon, and two *Venire facias's* awarded to the Sheriffs of the ſeveral Counties; and now ſeven of the County of *Worceſter* appeared, and five of *Glouceſter*. And although there ought to have been ſix ſworn of each County, to try that Iſſue, as appears 49 *Ed.* 3. 1. 31 *H.* 8. 46. yet by the Aſſent of Parties, thoſe twelve who appeared, by the Advice of all the Juſtices were ſworn, and tried the Iſſue. And it was commanded that this Aſſent ſhould be entred upon Record; for otherwiſe it would be a ſtrange Precedent.

This is called a Joinder of Counties. Finch 410. Jury out of two Counties.

But out of more than two Counties it cannot be made.

In Aſſiſe of Common *in Confinio Comitatus*, and the Iſſue be, whether he had Common by Preſcription in one County, appendant to a Manor

nor in another County, this ſhall be tried by both Counties. *Roll. Trial*, 599. *N. pl.* 5.

The ſame Law is in Treſpaſs brought in one County (which cannot be *in confinio*), upon ſuch an Iſſue the Trial ſhall be *per ambideux* Counties, 49 *E.* 3. 20. See *Roll.* Tit. *Trial*, 599, *&c.* many Caſes where the Jury ſhall come from two Counties.

In an Action upon the Statute of *Marlebridge*, for taking a Diſtreſs in one County and chaſing in another County; upon Not guilty the Trial ſhall be only by the County where the Chaſing is, for this is all the Cauſe of the Action. 4 *H.* 6. 4. *Roll. Trial*, 601. *pl.* 1.

In an Action on Stat. 2 *W. & M. c.* 5. for reſcuing a Diſtreſs for Rent; the Lands demiſed lay in three Vills; the Reſcue was laid to be in one of them. The *Venire* ſhall be from that Vill only where the Reſcue is laid; for the Action is founded on the Tort, and the Demiſe is only Inducement. 1 *Lutw.* 215.

Eſcape. In Eſcape upon Arreſt in one County, and an Eſcape in another County, upon Not guilty, this ſhall be tried, where the Eſcape is laid, for the Action is upon the Eſcape. *Roll. ibid.* 602. *pl.* 8.

Covenant in *P.* to ſell at *R.* tried at *P.* In an Action of *Trover*, *apud Paxton in Com. Hunt.* the Defendant pleads a Bargain and Sale *apud Royſton in Com. Hertford*, in the Market there, whereby he after converted them *apud P. in Com. Hunt'*. The Plaintiff ſaith, that he was poſſeſſed of thoſe Goods *apud P. in Com. Hunt.* and that *J. S.* there ſtole them from him, and by Covenant betwixt him and the Defendant, at *P. in Com. H.* he ſold them to the Defendant as he hath pleaded: The Iſſue was upon the Sale made by Covenant, *&c.* And it was tried

tried in the County of *Hunt.* and found for the Plaintiff. And it was moved to be a Mis-trial; for it ought to have been by a Jury of the County of *Hertford*, or at leastwise by a Jury of both Counties: But it was adjudged to be well tried, because the Sale is confessed, and the Issue is upon the Covenant alledged in *Hertford. Cro.* 3 Part 511.

Usurious Contract in another County.

In Debt upon a Bond in *London*, the Defendant pleaded an usurious Contract in the County of *Warwick*; the Plaintiff replied, that the Bond was made upon good Consideration; *absque hoc*, that it was made for such usurious Contract: The Trial shall be in the County of *Warwick*; for the Bond is confessed, and the Usury in *Warwick* is only in Question; and so if the Issue be, whether the Deed were made by *Dures*, the Trial shall be where the *Dures*, and not where the Deed is supposed to be made. *Cro.* 3 Part 195.

A *Dures* shall be tried there, not where the Action is brought.

Where Issue is taken upon a Surrender, it shall be tried where it was alledged to be done, and not where the Manor is, of which the Copyhold is holden. *Ibid. f.* 260. *Br.* Tit. *Visne*, 114.

Surrender.

In an *Assumpsit* laid at *London*, *in Warda de Cheap*, the *Venire* was *de Parochia de Arcubus in Warda de Cheap*, whereas no Parish was mentioned before in the Count; and adjudged, that the *Venire* was ill laid in the Count; for a *Venire facias* may be of a Town, Parish, Manor, or other Place unknown, but not of a Hundred or Ward, *Cro.* 1 Part 165. for the Ward in a City, is but as the Hundred in a County. The Parish in *London* is in Lieu of a Vill, and the Ward of a Hundred. *Roll.* Tit. *Trial*, 620, *pl.* 15. *vide hic apres.*

Ward or Hundred, no good *Visne*.

Where

City. Where the *Viſne* is laid to be at a City, in an Action brought in a ſuperior Court, or within the City, though it be both a City and County, the *Venire facias* may be *de vicinet. Civitatis.* *Latch* 258. Though it hath been held not good, but that the *Venire facias* may be *de Civitate*, leaving out *Vicinet.* as you may read in *Staundf.* 155. But now the Caſe in *Cro.* 2 Part 308. and *Bulſtr.* 1 Part 129. ſay, that all the *Venire facias's* are awarded *de vicinet. Civitatis*, which is intended as well *de Civitate* itſelf, as *de vicineto infra Juriſdictionem* of the City. And ſo it is *de vicinet. Civitatis*, or *de vicinet.* or *de Civitate Coventry*, *Eborum*, *Norwich*, *Sarum*, *Briſtol*, *Exon*, and all other Cities which are Counties in themſelves. In all Places beſides *London*, no Mention is made of the Pariſh or Ward. *Ibid.* 493. But in *London* the Pariſh and Ward is mentioned, and therefore it was adjudged *Cro.* 2 Part 150. that it was not good to alledge any Thing done in *London* generally; but it muſt be in what Pariſh from which a *Venire* may be; but where a Thing is laid in a City, *in alta Warda* there, and the *Venire facias* is from the City only, it is well, becauſe it ſhall be intended there be no more Wards in the ſame City. *Cro.* 3 Part 282.

Roll. 622, 623.

So in all inferior Courts, Style 2. March 125.

London.

City.

Hundred. In an Action againſt the Hundred upon the Statute of *Winton*, *&c.* upon the Roll the *Venire facias* is awarded of *Bradley*, *quod eſt proximum Hundredum*, and the *Venire facias* is generally of *Bradley.* This is well, becauſe by the Roll it appears that *Bradley* and the Hundred are all one. *Roll.* Tit. *Trial*, 598.

If a Thing be laid done *apud Briſtol*, *viz. in Warda Sanctæ Mariæ in Warda de Ratliff*, and

the *Venire facias* is *de Warda de Ratliff*, this is not good. *Ibid.* 619. *pl.* 5.

But if it be alledged in a Ward in the City of *Briſtol*, *&c.* the *Venue* ſhall be of the *Ward*, not *de Civitate*. *Ibid.* 621. *pl.* 28. Ward.

A *Venire facias* was awarded from *T.* and not *de vicinet. de T.* and for this Cauſe reſolved to be ill, and not amendable. *Cro.* 2 Part 399. *Bro.* Tit. *Ven. fac.* 8. *De vicinet.* left out, ill.

If the Iſſue be *ſi Rex conceſſit per literas patentes*, the Trial ſhall be, as hath been ſaid, where the Land lies, and not where the Patent was made, becauſe the Patent is of Record; and if it be traverſed, it ſhall be tried by the Record, and therefore the Iſſue being upon *Non conceſſit*, the Iſſue is not upon the Patent; but where the Iſſue is upon *Non conceſſit*, or *Non dimiſit*, of a Thing which paſſeth by Deed, the Trial ſhall be where the Grant or Demiſe is alledged: But of a Feoffment, or Leaſe for Life pleaded, the Iſſue being *Non feoffavit*, or *Non dimiſit*, Livery ought to be made, and therefore the Trial ſhall be where the Land lies. *Cro.* 2 Part 376. 3 Part 269. Where the Land lies. 1 Inſt. 125. *b.*

Where the Offence was laid in the Count to be in one County, and the Juſtification in another County, and the Plaintiff replies *De injuria ſua propria*, *&c.* The *Viſne* ſhall be where the Juſtification is alledged; as, one Example for all, to illuſtrate. In an Action upon the Caſe, for Words ſuppoſed to be ſpoken at *Bridge-North* in the County of *Salop*, the Defendant pleads, that he ſpake them as a Witneſs upon his Oath upon an Iſſue tried at *Chard* in the County of *Somerſet*. The Plaintiff replies *De ſon tort demeſne*, *&c.* And therefore it was tried by a *Venire facias* of *Bridge-North*, and Where the Action is laid in one County, and the Juſtification in another, the Trial ſhall be where the Juſtification is.

Error thereof aſſigned, becauſe it ought to have been by a *Viſne* of *Chard*, where the Juſtification aroſe; and it was held clearly to be a Miſtrial, and not aided by the Statute of *Jeofails*; wherefore the Judgment was reverſed. *Cro.* 3 Part, 468, 261, 870. *Moor* 410.

Vide poſt. *Replevin*, taking two Horſes at ſuch a Place in *Denford in Com. Northampton*; the Defendant makes Conuſance as Bailiff to the Lord *Mountague*, of his Manor of *S.* which Manor is holden of the Honour of *Glouceſter*, and that the Place in which, *&c.* is within the ſaid Honour, and alledges a Cuſtom within the ſaid Honour, on which Cuſtom the Parties were at Iſſue, and the *Venire facias* was from *Denford* the Place of taking, which was moved after Verdict, for that the *Venue* was not ſo large as the Iſſue, which was the Honour; and of this Opinion was the whole Court of *C. B. Paſch.* 13 *Car.* 2. *Hill* verſus *Bunning*, 1 *Siderf.* 19.

But the great Queſtion was, whence the *Venue* ſhould ariſe in this Caſe; and by *Bridgman* Chief Juſtice, and Juſtice *Hide*, in no Caſe can a *Venue* ariſe from an Honour; and the Chief Juſtice ſaid, he had cauſed the Prothonotaries to ſearch for Precedents, and they could not find that ever a *Venue* did ariſe from an Honour, which is a Bundle of Services, and an incorporeal Thing, from which no *Venue* can come; and yet an Honour may have Demeſnes, as the Honours of *Grafton* and *Hampton* have, but *Glouceſter* not.

Honours.

Siderfin 19, 88.

Chief Juſtice and Juſtice *Hide* ſeemed to incline that the *Venue* ſhould be *de corpore Comitat. Hob.* 266, 249. But when the Court was after moved for their Opinion, they bad them

take a *Venire facias* at their Peril, and would give no Opinion.

An Action of Debt was brought on a Bond to perform Covenants in an Indenture, whereby the Defendant had granted to the Plaintiff a Walk called *Shrob-Walk*, in the Foreſt of ——— *in Com. Northampton*, and covenanted for peaceable Enjoyment, *&c.* and he was ouſted *per* Earl of *Northampton*, who had Right, on which Right Iſſue was joined, and the *Venire facias* was from *Shrob-Walk*.

Per Cur. It is not good, for it appears by the Record, that *Shrob-Walk* is not a Vill: but if the Obligation had been laid to be made at *Shrob-Walk*, the *Venue* ſhould ariſe from thence, as a Vill. *Inter Stirt* and *Bales*, *Paſch.* 19 *Car.* 2. *B. R.*

The *Venue* ſhall follow, and be according to the Iſſue. Out of what County, *vide hic antè & poſtea.*

As for Words in *Warwickſhire*, *Thou art a Thief, and ſtoledſt my Iron:* The Defendant juſtifies and ſays, the Plaintiff ſtole the Iron in *Lieceſterſhire*, and brought it into *Warwickſhire*, and therefore he ſpake the Words in *Warwickſhire*. If the Plaintiff replies *De injuria ſua propria abſque tali cauſa*, the Jury ſhall come from *Leiceſterſhire*, to which the *abſque tali cauſa* refers, for the Words are acknowledged. See *Roll.* Tit. *Trial*, 598. *M. pl.* 3.

When Part of the Matter to be inquired of, is in one County or Place, and Part in another, the Trial ſhall be there where the beſt Conuzance of the Matter may be.

A Sheriff may aſſign a Bail Bond out of the County, and the Action may be brought where the Aſſignment was made. *Str.* 727.

From the Place beſt known.

As in an Action upon the Caſe; the Plaintiff declares that the Defendant took the Horſe of *A.* at *S.* and ſold him at *D.* to the Plaintiff as his proper Horſe, and afterwards *A.* retook the Horſe. If the Defendant plead, that the Property was in him, at the Sale, upon which Iſſue is joined, the *Venue* ſhall be *de S.* where the taking is ſuppoſed, for there the Property may be beſt known, which is only in Queſtion. 42 *Aſſ.* 8. *Roll. Trial*, 603.

If a tranſitory Action ariſe, Part in one County and Part in another, the Plaintiff has Election to lay it in which he pleaſes. *Harriſon's Pract. in K. B.* 85.

Where the Counties cannot join.

If the Iſſue be whether *L.* did ride from *London* to *York*, and from *York* to *London*, five Times in ſix Days, this may be tried in *London* only, although Part of the Matter to be inquired of, was done in each County. *Ibid.* 603.

In an Action of Battery in *London*, if the Defendant juſtifies in Defence of his Poſſeſſion in *D.* in *Eſſex*, and the Plaintiff ſays *de ſon tort demeſn ſans tiel cauſe*, this ought to be tried by both Counties, if they might join, becauſe he may be found guilty at another Day, and therefore becauſe they may not join, this may be tried in *Eſſex*. *Ibid.* 603. *pl.* 8.

Of *Aſſiſes in Confinio Com.* See 1 *Inſt.* 154.

In Caſe for Words in one County, if the Defendant juſtify in another County, and the Plaintiff reply *De ſon tort demeſn*, &c. although the Counties ought to join, if they could, and the Juſtification is principally put in Iſſue, yet the Trial may be in either County, at the Election of the Plaintiff. *Ibid. pl.* 9.

Roll *Tit.* Trial, 620.

London cannot join with another County. 49 *E.* 3. 20.

In Ejectment in *London*, upon a Leaſe made there of Land in *Midd.* if the Defendant plead

Not guilty, this may be tried in *London*; because the Counties cannot join, although the *Jury* ought to inquire of the Ejectment in *Midd.* and *Judgment* affirmed in a Writ of Error. See *Roll.* Tit. *Trial*, 603. *pl.* 10.

Two Counties may join although they be not neareſt, nay, though twenty Counties be between them. *Finch*, *French* 59 a. 1 *Inſt.* 154.

But if it be of a Leaſe at *Ickford* of Land in *Bury* in *Suffolk*, the *Venue* muſt be of *Bury*, not of *Ickford.* 619.

Where the Writ is brought.

If the Iſſue be taken upon the Name or Condition of the Perſon, this ſhall be tried in the County where the Writ is brought. 21 *E.* 4. 8. for this may be well known there. *Roll. ibid.* 615.

Where the Iſſue is to be tried upon a Point which ſhall be tried by two Counties, and one cannot join with the other, this ſhall be tried where the Writ is brought. 21 *E.* 4. 8. But for this, ſee before, where the Counties cannot join.

Where in other County than where the Writ is brought.

In Debt in *London* againſt *J. S.* of *D.* in *Eſſex*, if the Defendant ſaith that he was at *S.* in *Eſſex*, at the Time of purchaſing the Writ, and not at *D.* this ſhall be tried in *Eſſex*, and not where the Writ is brought, for none can know where he dwelt ſo well as the County of *Eſſex.* 12 *H.* 6. 5.

Vide many Caſes in *Roll. ibid.* 605, *&c.* about this Matter.

Where the *Eſcape* was, and not where the *Arreſt* was.

In an Action of the Caſe againſt a Sheriff, upon an Eſcape in *London*, and the Arreſt laid to be in *Southampton*; adjudged, that the *Viſne* ſhall be where the Eſcape was, becauſe that is the Ground of the Action, and not where the Arreſt was. *Cro.* 3 Part 271.

Deceit. Eſcape,

Nota; In an Action of the Caſe for Deceit, or upon an Eſcape, the Court will not change the *Viſne* out of the County where the Plaintiff ſuppoſes the Thing to be done. *Siderfin* 95.

Scandalum Magnatum.

Nor in a *Scandalum Magnatum*, upon the common Affidavit. *Ibid.* 185. See *Str.* 807.

Informations.

Nor in Actions upon penal Statutes, for they muſt be brought in their proper County. *Ibid.* 287.

Two Counties.

Nor where the Cauſe of Action is in two Counties, and the Plaintiff laid his Action in one of them. *Ibid.* 405.

If the Plaintiff will be bound to give no Evidence but what ariſes in the County, where he lays his Action, the Court will not change the *Venue*, upon the common Affidavit. *Ibid.* 442.

A Counſellor at Law Plaintiff, his *Venue* ſhall not be altered, becauſe of his Attendance at the Court. *Modern Rep.* 84. 2 *Show.* 176, 242.

A Barriſter has Privilege (in a tranſitory Action) to lay the *Venue* in *Middleſex*; but a Maſter in *Chancery (as ſuch)* has not. *Str.* 822, 2 *Ld. Raym.* 1556.

An *Attorney* has Privilege to change the *Venue* into *Middleſex*, as well as lay it here when Plaintiff. *(a) Str.* 1049. But a *Barriſter*, *Attorney* or Officer of the Court cannot change the *Venue* into *Middleſex*, when joined in an Action with unprivileged Perſons, or ſue or are ſued in *Auter droit*, as Executors, *&c.* *Ibid.* 610. *Ld. Raym.* 1556.

(a) Same Privilege has an Officer of the Court. But *Venue* may be changed from *Middleſex*, though the Plaintiff be an *Attorney*, if he ſues by *Capias*, and not by *Attachment*. *Harriſon's Pract. C. P.* 137. So if he does not declare in Perſon. *Ibid.*

In

In Debt upon an Obligation, Payment was pleaded *apud domum mansionalem Rectoriæ de Much-Hadam*, and the *Venire facias* was *de vicinto de Much Hadam*, where it ought to have been *de vicinet. Rectoriæ de Much-Hadam*; but it was adjudged good, because *Much-Hadam* is here intended a Vill. 3 *Cro.* 804. So you see that where a Thing is alledged to be done at the Capital House * of *D.* there the *Venire* shall be of *D.* for that is intended to be all one with the Vill. But where it is at the Castle of *Hertford*, &c. there the *Venire facias* shall not be *de vicineto de Hertford*, but *de Castro de Hertford*, for *Castrum Hertford* is intended a distinct Place by itself; and so of all Castles. *Cro.* 2 Part 239. *Moor* 216. 2 Salk. 665, 670. 2 Vent. 47. * *Rectoriæ.* Castle. Roll. *Tit. Trial*, 621.

A *Venire facias* may be awarded of a Castle. *Roll.* 618.

Where the Issue is not Parcel of the Manor of *D.* or the Custom of a Manor is in Question, the *Venire* ought to be of the Manor. *Hob.* 284. *Cro.* 2 Part 327. If the Manor be laid to be in a Vill, the *Venire facias* may be of the Manor in the Vill, as *de vicineto manerii de Stansted-Hall* in *Windham*. *Cro.* 2 Part 405. *Moor* 518. *Arundel*'s Case, *li.* 6. 14. Manor. Roll. *Tit. Trial*, 621.

The *Venue* cannot be of a Scite of a Manor. *Roll.* Tit. *Trial*, 618.

In the *Common Bench*, in Trespass, for taking away a Bag of Pepper. The Defendant justified as a Servant of the Mayor and Commonalty of *London*, for Wharfage due to them by the Custom of *London*, which the Plaintiff refused to pay. The Plaintiff replied that the Custom did not extend to him, because he was a Freeman of the City, and ought not to pay Wharfage; to which the Defendant rejoined, that the

Cuſtom extended to him as well as to Strangers; upon which Iſſue was joined.

Recorder. Reſolved, 1. That the Iſſue ſhould be tried *per Pais*, not by the Mouth of the Recorder, becauſe he certifies nothing but what the Mayor and Aldermen direct, who are concerned in the Cauſe.

Where the Trial ſhall be by the County nextadjoining. 2. That the *Venire facias* ſhall not be awarded to the Sheriffs of *London* or *Middleſex*, becauſe the Trials there are by Freemen. But it ſhall be to the County next adjoining, *viz.* the Sheriff of *Surrey*. So where any City is concerned, the *Venire facias* ſhall not be directed to the Officers of the City, but to the County next adjoining. *Hob.* 85. *Style* 137. *Moor* 171. *vide hic, cap.* 2. See *Hardres* Reports, f. 309. Good Learning concerning this Matter.

If the Iſſue concern the Mayor and Commonalty of a Town, the *Array* ſhall be made all of Foreigners. 31 *Aſſiſe* 19. *Vide Roll.* Tit. *Trial*, 596.

So if the Iſſue concern the Mayor and Commonalty, *&c.* although they are not Parties, yet the *Venire facias* ſhall be directed to the Sheriff of the next County. 15 *E.* 4. 18.

Information for Seizure. See *Hardres* Reports, f. 16, *&c.* Good Matter in an Information upon a Seizure, in what Place the *Viſne* ſhall be, and the Entry and Manner of quaſhing one *Venire facias*, and awarding a *Venire facias de novo*, *&c.*

Where a Man lends his Horſe in one Place, and he is ſpoiled in another, *Viſne* where he is ſpoiled. Where a Man lends a Horſe to another to till his Land, and the Horſe dies with exceſſive Labour, the *Viſne* ſhall be from the Place where the exceſſive Labour was, and not where the Delivery was. *Moor* 887. *Vide Hob.* 188. *Roll.* Tit. *Trial*, 615. *Paſch.* 22 *Car.* 2. *B. R. Horſley* verſus *Potter*.

Where

Where a Promise is laid in one Place, and the Breach in another, the *Visne* must be according to the Event of the Issue, whether it be taken upon the Promise or Breach. But if no Place be alledged for the Breach, and Issue be taken upon it, the *Visne* must be from the Place of the Promise, which shall be intended right, where the contrary appears not. See *Godb.* 274. Promise in one Place, and Breach in another; *Visne* guided by the Issue. Modern Rep. 36, 37.

Easter 39 *Eliz.* In the *King's Bench*; *Trespass*, *Assault* and *Battery* in *Wilts.* continuing the Assault in *Middlesex*; and adjudged that the *Jurors* shall come out of both Counties. *Moor* 538.

The Name of a Manor or Land, or other local Thing shall be tried where it lies, because it is local; but the Name or Addition of a Person shall be tried where the Action is brought, because this is transitory. *Bro.* Tit. *Visne*, 7. *lib.* 6. 65. Misnomer.

In Covenant upon an Indenture of *Demise* of the *Rectory* of *Stoken-Church* in the County of *Oxford*, *That the Defendant had good Power and Authority to demise*. The Indenture was alledged to be made at *London*, and the *Venire facias* was awarded to the Sheriff of *Oxon*; and this being assigned for Error, Judgment was affirmed, and this adjudged to be good. *Moor* 710. Because the Rectory was *in comitat. Oxon. vide Page* . Where the Land lies.

In Debt upon an Obligation in one County to perform Covenants in a Lease, and the Land and Payments were in another County; the Trial shall be where the Land and Payments are. 44 *E.* 3. 42. *Roll. Trial*, 607. *pl.* 1. Where the Land lies, and not where the Writ, &c.

In Debt upon a Lease in one County, and the Payment of the Rent upon the Lease limited there also, but the Land was in another County,

and

and the Payment upon the Land; this ſhall be tried where the Land and Payment was, for he was bound to pay this there upon the Diſtreſs. *Ibid. pl.* 2.

But the Trial ſhould have been where the Writ was brought, if the Payment had not been alledged to be where the Land was. *Ibid. pl.* 3.

Where the Land and Writ &c.

If Debt be brought for Rent upon a Leaſe for Years, and the Action is brought where the Land is, but the Deed of the Leaſe bears Date in another County, the Trial ſhall be where the Land and Writ is brought. 44 *E.* 3. 8. The Iſſue being whether the Leſſor had a conditional Eſtate or not, and ſo a lawful Eviction. *Ibid. pl.* 7.

Where the Land lies, and where not.

If the Iſſue be in an Aſſize, whether the Tenant be the eldeſt Son of *J. S.* and his Birth is alledged in another County, yet this ſhall be tried where the Land is. 46 *Aſſ.* 5.

If an Infant bring an Aſſize, and a Releaſe of his Anceſtor is pleaded againſt him, dated in another County, this muſt be tried where the Releaſe is dated, and not by the Aſſize, although the Plaintiff be an Infant, and the Circumſtances are to be inquired. 21 *E.* 3. 23. See *Roll. ibid.* 611. *pl.* 37.

Where from two Places in one Country, and where not, *vide cap.* 10.

In Caſe, if the Plaintiff declare upon a Truſt at *D.* and of a Wrong at *S.* Upon not guilty, if it appear the Truſt is not material, the *Venue* ſhall only come from *S.* and not from both Places, one not being material.

In Caſe, for ſtopping a Way from ſuch a Place to ſuch a Place, and that the Obſtruction was at *D.* Upon Not guilty, the *Venue* ſhall not come from *D.* only, for all the Way is put in Iſſue.

If

If the *Nar.* be *apud A. in Com. B.* and the *Venire* is *de Vill. & paroch. de A.* 'tis ill. *Yelv.* 104. 2 *Cro.* 586. The *Venire* as large as the *Nar.* and no *Venire* from two Vills.

When the *Venue* ſhall be from two Vills. 2 *Cro.* 599. *Yelv.* 26, 182, 187.

In Treſpaſs in one Vill, and a Releaſe pleaded in another Vill, within the ſame County, upon *Non eſt factum*, this ſhall be tried *per ambideux*. *Roll. ibid.* 624. *Vide hic ante.* See *Roll. ibid.* 615. many Caſes about this.

Where the *Venue* cannot be from a Vill, Hamlet or *Lieu Conus*, (*a*) there it may be *de Corpore Comitatus*, for if it might not be ſo, the Cauſe could not be tried. *De Corpore Com.*

Debt for Rent, and the Demiſe was laid *in & ſuper Acclivitatem de Hampſtead-Hill*; and held not a good *Venue*. 2 *Vent.* 249, 270.

A Cuſtom of a County is to be tried *de Corpore Comitatus*, for the Cuſtom runs through the whole County.

Where the Pariſh is named by way of Denotation, or Explanation of the Place where the Fact is alledged to be done, as at the Pariſh-Church of *Hauk-bucknol*, there the *Venire facias* ſhall be of the Town, not of the Pariſh. *Bulſtr.* 1 Part 60, 61. Pariſh.

If the Fact be alledged in *Kingſtreet* in the Pariſh of St. *Margaret in Com. Midd.* you have already heard that the *Viſne* ſhall be from *Kingſtreet*, becauſe it is intended to be a Town; but where it is alledged to be done at *Gray's* Town.

(*a*) A *Lieu Conus* is a Caſtle, Manor, or other notorious Place well known, and generally taken Notice of by thoſe who dwell about it, and not a Cloſe or Paſture of Ground, or ſuch like Place of no Repute.

Inn

Inns of Court. *Inn Hall*, or *Lincoln's Inn Hall*, *&c.* in *Holborn*, the *Viſne* ſhall be from *Holborn*, which is the Town; for as *Yelverton* ſaid, it was never heard of any *Venire facias* to be had of any of the Inns of Court. *Bulſtr.* 2 Part 120. eſpecially of the *Hall*, becauſe it cannot be of a *Houſe*, much leſs of a *Hall*.

Not from Houſe or Hall.

In Ejectment upon a Demiſe made at *Denham*, of Lands *in Parochia de Denham prædict'*; the *Viſne* may be of *Denham*, or of the Pariſh of *Denham*, becauſe *Denham* and *Parochia de Denham Prædict.* are all one by Intendment of Law. *Bulſtr.* 2 Part 209. *Moor* 709. *Hob.* 6. But when it appears by the Record, or is intended that the Pariſh is more ſpacious than the Town, as the Caſe in *Moor* 837. where in Ejectment the Leaſe was alledged to be made at *Bredon* of Tithes in *W.* and *W.* Hamlets within the Pariſh of *Bredon*, there the *Venire facias* muſt not be of *Bredon*, but of the Pariſh, becauſe it appears, that the Pariſh extends further than the Town. *Hob.* 326.

Pariſh.

For Rent where the Land lies, and where not.

Where an Action of Debt for Rent is brought upon the *Privity of the Contract*, by the Leſſor, or againſt the Leſſee, or his Executors, for Arrearages due in the Life-time of the Teſtator, the *Viſne* may be laid in any Place; but where the Action is brought upon the *Privity in Eſtate*, as againſt the Aſſignee of the Leſſee, or his Executors, for Rent due after the Teſtator's Death, the *Viſne* muſt be where the Lands lie. *Latch* miſprinted 197, 262, 271. *Vide li.* 3. 24. (*a*).

(*a*) Debt lies for Rent either in the County where the Deed was made, or the Lands lie, if the Action be againſt the Leſſee; but if brought (by or) againſt an *Aſſignee*, it muſt be brought in the County where the Land lies; for the Aſſignee is only on the *Privity* of Eſtate, and not upon the Contract. *Str.* 776.

And

And ſo it was adjudged in the Caſe of *Hall* and *Arnold*, 1656. *B. R.* And it was further adjudged there, the Caſe being of a Leaſe made at *London*, of Lands in *Monmouthſhire*, rendring Rent payable at the *Old Exchange*, for which an Action is brought by the Heir. If there had been no Place of Payment, the Heir muſt have brought his Action where his Lands lie, but the Place of Payment being in another County, he has his Election, as on a Leaſe for Years of Lands in two Counties.

Venue not to be changed in an Action of Debt for Rent. *Per tot. Cur. M.* 4 *Geo.* 2. *MS. Rep. Str.* 878. In all Actions of Debt *Venue* unchangeable, *per Ch. Juſtice. MS. Rep.*

Walker's Caſe, in Debt upon a Leaſe of Land in another County, *Nihil debet* ſhall be tried where the Action is brought. *Bro.* Tit. *Viſne*, 119. Debt for Rent of Land in another County.

In *Replevin* brought by *Strede* againſt *Hartly*, for taking a Diſtreſs at *Baildon*, the Defendant made Conuſance as Bailiff, becauſe the *locus in quo*, *&c.* was holden of *W. H.* as of his Manor of *Baildon*; and upon Iſſue *hors de ſon fee*, the *Venire facias* was *de vicineto de Baildon*; and upon Motion that the *Venire facias* ought to have been as well from the Manor as the Town, the Court adjudged it to be well enough, for that the Court ſhall not intend the Manor was larger than the Town, becauſe it doth not appear ſo to be, though poſſibly it might, as like the Caſe of a Town and Pariſh. *Hob.* 305, 306. Manor.

If the Sheriff return, that there are no Freeholders of that *Viſne*, or if the *Viſne* be where the King's Writ runs not, as in the *Cinque Ports*, *&c.* or in a Place where the Men are privileged from ſerving on Juries out of that Place, as the Iſle of *Ely*, *&c.* the Plaintiff may pray *Viſne* next adjoining, in what Caſes. *Cinque Ports.*

pray a *Venire facias* of the *Viſne* next adjoining:

Wales. And if the *Viſne* be in *Wales*, (*ou Brief le Roy ne court*) the *Venire facias* ſhall be directed to the Sheriff of the next *Engliſh* County, to cauſe the Jury to come *de propinquiori Viſne* of his County to the *Viſne* in *Wales* adjoining; for the Court ſhall not be ouſted of the Plea. *Fitz. Abr.* Tit. *Viſne*, 8. *Juriſdict.* 24.

In an Action againſt a Hundred, the *Venire facias* may come from the next Hundred generally. *Vide Comb. Rep.* 332.

In Treſpaſs, if the Defendant plead Not guilty to Part, and to the Reſidue a Plea, which cauſes the Trial of that to be by a Jury *de prochein* Hundred; the *Venire* ſhall be awarded *al prochein* Hundred for both Iſſues, becauſe there ought not to be two *Venire facias's* in one Action. *Vide Roll.* Tit. *Trial*, 596. *pl.* 4.

In an Appeal of Murder committed in the *Cinque Ports*, although the King be concerned, yet becauſe this is betwixt common Perſons, the *Venire facias* ſhall be to the next adjoining Vill. *Ibid. pl.* 6.

Ireland. If the Iſſue be joined of Matter in *Ireland*, this ſhall be tried by a Jury of the next County in *England*. *Ibid.* 587. *pl.* 8.

If the Iſſue be to be tried by the *Venue* of a Manor, and the Plaintiff ſuggeſts that he is

Prochein Hundred. Lord of the Hundred in which the Manor is, and that all within the Hundred are within his Diſtreſs, if the Defendant acknowledge this, the *Venue* ſhall not be *de Corpore Comitatus*, but of the next Hundred, for if it ſhould be *de Corpore Comitatus*, this ſhould be tried by the Tenants of the Manor.

Viſne miſawarded in Part. If the *Viſne* is in ſome Part miſawarded, or ſued out of more Places or fewer than it ought

to

to be, ſo as ſome Place be right named, this is aided by the Statute of *Jeofails*, which hath ended the Differences in many Caſes reported in our Books concerning this Point; wherefore I purpoſely omit them.

Error, for that the Judgment was given by Default againſt the Defendant, being an Infant, upon Iſſue, that he was of full Age: Adjudged, That the Trial ſhould be in *Norfolk* where the Land was, and not in *Middleſex*, where the Action was brought. *Cro.* 3 Part 818. Infancy, where the Land lies.

If the *Viſne* cometh from a wrong Place, yet if it be *ex aſſenſum partium*, and ſo entred of Record, it ſhall ſtand; for *Omnis Conſenſus tollit errorem.* 1 Inſt. 125. May be out of a wrong Place by Conſent.

Where the Iſſue is local, the *Viſne* cannot be changed by Conſent. *Siderfin* 339.

Holmes verſus *Saunders*, *Hill.* 22, 23 *Car.* 2, *B. R.* Error to reverſe a Judgment given in the *King's Bench* in *Ireland*, in Debt for Rent brought by the Aſſignees of a Reverſion; the Plaintiff declared of a Leaſe of Land in ſuch a Pariſh in the Suburbs of *Dublin*; on *Nil debet* pleaded, the *Venire facias* was from the ſaid Pariſh *in Civitate Dublin*, and Judgment there *pur* Plaintiff; it was aſſigned for Error, becauſe the Land lies in the Suburbs of the City, and the *Venire facias* was from a Pariſh in the City.

Per Cur. It is all one, for the Suburbs are always within the Franchiſe of the City, as *Fleet-ſtreet* is within the Suburbs of *London*, but the *Strand* not, though ſo reputed.

Note; It was adjudged Error in an inferior Court, that the *Venire facias* was awarded *ſecundum conſuetudinem Curiæ*, which ought to be *per Curiam*. *Reader* verſus *Moore*, *Mich.* 1650, *B. R.*

By

By the Statute of 16 & 17 *Car.* 2. After Verdict, Judgment ſhall not be ſtayed or reverſed, for that there is no right *Venue*, ſo as the Cauſe were tried by a Jury of the proper County or Place where the Action is laid. This Act doth not extend to Appeals, Indictments of Felony, *&c.* nor to Actions upon Penal Statutes, other than concerning Cuſtoms and Subſidies, *&c.*

Caſe, for that whereas the Plaintiff had let the Defendant a Horſe to ride from *Swaffham* in *Norfolk* to *Ipſwich* in *Suffolk*, the Defendant *in itinere illo tam immoderate equitavit Equum præd.* that he died. It was tried at *Norfolk*; after Verdict it was moved in Arreſt of Judgment, that no Place was laid where the immoderate Riding was, and the Journey is in two Counties; but held aided by Stat. 17 *Car.* 2.

Caſe for Scandalous Words, which were laid to be ſpoken at *London*, charging the Plaintiff with ſtealing Plate out of *Wadham* College at *Oxford*. The Defendant juſtifies, for that the Plaintiff *apud Oxon in Com. Oxon* ſtole Plate out of *Wadham* College: The Plaintiff replied *De injuria ſuâ propriâ*; and upon that Iſſue was joined and tried in *London*, and a Verdict for the Plaintiff. Upon which it was moved in Arreſt of Judgment, that this was a Miſ-trial; but it was held by *Keeling* C. J. and *Rainsford* and *Moreton*, that this was a good Trial within Stat. 16, 17 *Car.* 2. being tried by a Jury of the proper County where the Action was laid. 1 *Saund.* 246. 1 *Vent.* 22.

Caſe for ſcandalous Words, ſaying he was perjured; and it was laid in *Devonſhire*. The Defendant juſtified, that the Plaintiff made a falſe Oath at *Launceſton* in *Cornwall*; and Iſſue was

was taken on that, and tried in *Devonſhire*, and held aided by Stat. 16, 17 *Car.* 2. 1 *Vent.* 263. 2 *Lev.* 121.

Covenant for Non-payment of Rent of Allom Mines was brought in *London*, where the Deed was ſuppoſed to be made: The Defendant pleads, that the Plaintiff had incloſed the Mine, ſo that he could not enter to work it; and Iſſue being taken on that, it was tried in *London*; and being found againſt the Defendant, it was moved in Arreſt of Judgment that this was a Miſ-trial; but it was anſwered, that it was aided by Stat. 16, 17 *Car.* 2. *Jones T.* 82.

Venue altered where a Peer was Party.

Earl of *Shaftſbury* verſus *Graham & al'*, *B. R.* Reſolved in *Eaſter* Term 34 *Car.* 2. That the Court had Power to alter the *Venue*, in Caſe of a Peer; eſpecially if there be no Likelihood of an indifferent Trial in the Place where the Action is laid. 1 *Vent.* 363, 364, 365.

Venire to be awarded *de Corpore Com.*

Every *Venire* out of the Courts of Record at *Weſtminſter*, ſhall be awarded of the Body of the County, where the Iſſue is triable: Provided that this Clauſe ſhall not extend to Appeals of Felony or Murder, or to any Indictment or Preſentment of Treaſon, Felony, or Murder; or to any Proceſs on any of them; or to any Writ, Bill or Information on any Penal Statute. 4 & 5 *Ann. cap.* 16. (*a*).

Debt *qui tam*, on the Stat. 9 *Ann.* againſt *Gaming*, and a Verdict for Plaintiff: It was moved in Arreſt of Judgment, that the *Venire* was *de Corpore Com.* and that Penal Actions are

(*a*) The Court ſaid, that ſince this Statute it ſeems unneceſſary in the Declaration to ſet forth a particular *Pariſh* or *Vill* for a *Venue*. *E.* 13 *Geo.* 1. in the Caſe of *Crabtree* and *Moorcroft*, *MS. Rep.*

excepted in the Statute for the Amendment of the Law, but held well and aided by the Jury Act, and Stat. 5 *Geo.* 1. *French* qui tam, v. *Wiltſhire*, *H.* 11 *Geo.* 2. *B. R.*

Since our Author wrote, there has been a great Alteration in the Law, as to Jurors, for by the Statute 3 *Geo.* 2. *cap.* 25. for the better Regulation of Jurors, it is enacted, 'That the 'Perſon or Perſons, required by a Statute made 'the Seventh and Eighth Years of the Reign 'of his late Majeſty King *William* the Third, '[intitled, *An Act for the Eaſe of Jurors, 'and better regulating of Juries,*] and by a 'Clauſe in another Act, made in the third and 'fourth Years of the Reign of the late Queen '*Anne* [intitled, *An Act for making perpetual 'an Act for the more eaſy Recovery of ſmall 'Tithes*; and alſo *an Act for the more eaſy 'obtaining Partition of Lands in Coparcenary, 'Joint-Tenancy, and Tenancy in Common*; and 'alſo *for making more effectual and amending 'ſeveral Acts relating to the Return of Jurors,*] 'to give in, or who are by Virtue of this 'Act to make up true Liſts in Writing of 'the Names of Perſons qualified to ſerve on 'Juries, in order to aſſiſt them to complete 'ſuch Liſts, purſuant to the Intent of the ſaid 'Act, ſhall (upon Requeſt by him or them 'made to any Pariſh Officer or Officers, who 'ſhall have in his or their Cuſtody any of the 'Rates for the Poor or Land-Tax, in ſuch Pa-'riſh or Place) have free Liberty to inſpect 'ſuch Rates, and take from thence the Name 'or Names of ſuch Freeholders, Copyholders, 'or other Perſons qualified to ſerve on Juries, 'dwelling within their reſpective Pariſhes or 'Precincts, for which ſuch Liſt is to be given

Liſts of Jurors qualified according to the Act 7 & 8 *W.* 3.

and 3 & 4 *Ann.*

to be made from the Rates in each Pariſh,

'in and returned, pursuant to the said Acts; 'and shall yearly and every Year, twenty 'Days at least before the Feast of Saint *Mi-* 'chael the Archangel, upon two or more *Sun-* 'days, fix upon the Door of the Church, Cha- 'pel, and every other publick Place of reli- 'gious Worship, within their respective Pre- 'cincts, a true and exact List of all such Per- 'sons intended to be returned to the Quarter- 'Sessions of the Peace, as qualified to serve on 'Juries, pursuant to the Directions of the said 'Act, and leave at the same Time a Duplicate 'of such List with a Church-warden, Chapel- 'warden, or Overseer of the Poor of the said 'Parish or Place, to be perused by the Pa- 'rishioners without Fee or Reward, to the 'End that Notice may be given of Persons so 'qualified, who are omitted, or of Persons in- 'serted by Mistake, who ought to be omitted 'out of such Lists; and if any Person or Per- 'sons, not being qualified to serve on Juries, 'shall find his or their Name or Names men- 'tioned in such List, and the Person or Per- 'sons required to make such List shall refuse to 'omit him or them, or think it doubtful 'whether he or they ought to be omitted, it 'shall and may be lawful to and for the Justices 'of the Peace for the County, Riding, or Divi- 'sion, at their respective General Quarter-Sessi- 'ons, to which the said Lists shall be so returned, 'upon Satisfaction from the Oath of the Party, 'complaining, or other Proof, that he is not 'qualified to serve on Juries, to order his or their 'Name or Names to be struck out, or omitted 'in such List, when the same shall be entred in 'the Book to be kept by the Clerk of the Peace 'for that Purpose, pursuant to the said Act.

and yearly fixed upon Church Doors.

Persons not qualified may be relieved at the Quarter-Sessions.

Wilfully omitting, or inserting wrong Persons, forfeits 20*l.* for every Person so omitted or inserted.

§. 2. 'It is further enacted, That if any Person 'or Persons, required by the said Acts to return 'or give in, or by Virtue of this Act to make 'up any such List, or concerned therein, shall 'wilfully omit, out of any such List, any Per'son or Persons, whose Name or Names ought 'to be inserted, or shall wilfully insert any Per'son or Persons, who ought to be omitted, or 'shall take any Money or other Reward for omit'ting or inserting any Person whatsoever; he or 'they so offending shall, for every Person so 'omitted or inserted in such List, contrary to the 'Meaning of this Act, forfeit the Sum of 'twenty Shillings for every such Offence, upon 'Conviction before one or more Justice or 'Justices of the Peace of the County, Riding 'or Division, where such Offender shall dwell, 'upon the Confession of the Offender, or Proof 'by one or more credible Witness or Wit'nesses on Oath; one Half thereof to be paid 'to the Informer, and the other Half to the 'Poor of such Parish or Place, for which the 'said List is returned; and in case such Pe'nalty shall not be paid within five Days after 'such Conviction, the same shall be levied by 'Distress and Sale of the Offender's Goods, 'by Warrant or Warrants from one or more 'Justice or Justices of the Peace, returning the 'Overplus, if any there be; and the said Ju'stice or Justices, before whom such Person 'shall be convicted of such Offence, shall, in 'Writing under their Hands, certify the same 'to the Justices at their next General Quarter-'Sessions, which shall be held for the County, 'in which the Person or Persons so omitted or 'inserted shall dwell, which Justices shall di-

'rect

' rect the Clerk of the Peace for the Time be-
' ing to inſert or ſtrike out the Name or Names
' of ſuch Perſon or Perſons, as ſhall by ſuch
' Certificate appear to have been omitted or in-
' ſerted in ſuch Liſts, contrary to the Meaning
' of this Act; and Duplicates of the ſaid Liſts,
' when delivered in at the Quarter-Seſſions of
' the Peace, and entred in ſuch Book, to be
' kept by the Clerk of the Peace for that Pur-
' poſe, ſhall, during the Continuance of ſuch
' Quarter-Seſſions, or within ten Days after, be
' delivered or tranſmitted by the Clerk of the
' Peace to the Sheriff of each reſpective County,
' or his Under-Sheriff, in order for his returning
' of Juries out of the ſaid Liſts; and ſuch She-
' riff or Under-Sheriff ſhall immediately take
' care, that the Names of the Perſons contained
' in ſuch Duplicates, ſhall be faithfully entred
' alphabetically, with their Additions and Places
' of Abode, in ſome Book or Books to be kept
' by him or them for that Purpoſe; and that
' every Clerk of the Peace neglecting his Duty
' therein, ſhall forfeit the Sum of twenty
' Pounds to ſuch Perſon or Perſons as ſhall in-
' form or proſecute for the ſame, until the
' Party be thereof convicted upon an Indict-
' ment before the Juſtices of the Peace, at any
' General Quarter-Seſſions of the Peace to be
' holden for the ſame County, Riding, Divi-
' ſion, or Precinct.

Duplicates of the Liſts to be tranſmitted to the Sheriff,

by the Clerk of the Peace, on Pain of 20*l.*

' And it is further enacted, That in caſe
' any Sheriff, or Under-Sheriff, Bailiff, or o-
' ther Officer, to whom the Return of Juries
' ſhall belong, ſhall ſummon and return any
' Perſon or Perſons to ſerve on any Jury, in
' any Cauſe to be tried before the Juſtices of
' Aſſize, or *Niſi prius*, or Judges of the ſaid

Sheriff, &c. returning any Perſon whoſe Name is not in the Duplicate,

'Great Seſſions, or the Judge or Judges of the 'Seſſions for the ſaid Counties Palatine, whoſe 'Name is not inſerted in the Duplicates ſo 'delivered or tranſmitted to him or them by 'ſuch Clerk of the Peace, if any ſuch Duplicate 'ſhall be delivered or tranſmitted; or if any 'Clerk of Aſſize, Judge's Aſſociate, or other 'Officer, ſhall record the Appearance of any 'Perſon ſo ſummoned and returned as afore-'ſaid, who did not really and truly appear, 'then and in ſuch Caſe any Judge or Juſtice of 'Aſſize or *Niſi prius*, or Judge or Judges of the 'ſaid Great Seſſions, or the Judge or Judges of 'the Seſſions for the ſaid Counties Palatine, 'ſhall and may, upon Examination, in a ſum-'mary Way, ſet ſuch Fine or Fines upon ſuch 'Sheriff, or Under-Sheriff, Clerk of the Aſſize, 'Judge's Aſſociate, or other Officer, for every 'ſuch Perſon ſo ſummoned and returned as afore-'ſaid; and for every Perſon, whoſe Appearance 'ſhall be ſo falſly recorded, as the ſaid Judge 'or Juſtice of Aſſize, *Niſi prius*, or of the ſaid 'Great Seſſions, or the Judge or Judges of the 'Seſſions for the ſaid Counties Palatine, ſhall 'think meet, not exceeding ten Pounds, and 'not leſs than forty Shillings.'

Or Clerk of Aſſize recording Appearances when the Party did not appear, to be fined.

'And for preventing Abuſes by *Sheriffs*, *Under-Sheriffs*, *Bailiffs*, *or other Officers concerned in the ſummoning or returning of Jurors*, it is enacted, That no Perſons ſhall be returned as Jurors to ſerve on Trials at any Aſſizes, or *Niſi prius*, or at the ſaid Great Seſſions, or at the Seſſions for the ſaid Counties Palatine, who have ſerved within the Space of one Year before in the County of *Rutland*, of four Years in the County of *York*, or of two Years before in any other County, not being a County of 'a City

Juſtices of Aſſize, &c. may fine Sheriff, &c. for returning Jurors irregularly.

' a City or Town; and if any ſuch Sheriff ſhall ' wilfully tranſgreſs therein, any Judge or Ju- ' ſtice of Aſſize or *Niſi prius*, or of the ſaid ' Great Seſſions, or the Judge or Judges of the ' Seſſions for the ſaid Counties Palatine, may, ' and is hereby required on Examination and ' Proof of ſuch Offence, in a ſummary way, to ' ſet a Fine or Fines upon every ſuch Offender, ' as he ſhall think meet, not exceeding five ' Pounds for any one Offence. (*a*)

Sheriff, &c. to enter the Names of thoſe who have ſerved:

' It is further enacted, That the Sheriff, Un- ' der-Sheriff, or other Officer, to whom the ' Return of Juries ſhall belong, ſhall from Time ' to Time enter or regiſter in a Book to be kept ' for that Purpoſe, the Names of ſuch Perſons ' as ſhall be ſummoned, and ſhall ſerve as Ju- ' rors on Trials at any Aſſizes, or *Niſi prius*, or ' in the ſaid Courts of Great Seſſions, or Seſſi- ' ons for the ſaid Counties Palatine, together ' with their Additions and Places of Abode al- ' phabetically, and alſo the Times of their Ser- ' vices; and every Perſon ſo ſummoned and at- ' tending, or ſerving as aforeſaid, ſhall (upon ' Application by him made to ſuch Sheriff, Un- ' der-Sheriff, or other Officer) have a Certifi- ' cate teſtifying ſuch his Attendance or Service ' done, which Certificate the ſaid Sheriff, Un- ' der-Sheriff, or other Officer, is hereby di- ' rected and required to give without Fee or ' Reward; and the ſaid Book ſhall be tranſmit- ' ted by ſuch Sheriff, Under-Sheriff, or other ' Officer, to his or their Succeſſor or Succeſſors, ' from Time to Time.'

and give Certificates.

(*a*) Note; by the 4 *Geo.* 2. *c.* 7. this Clauſe is repealed as to the County of *Middleſex*, and no Perſon to ſerve who has ſerved within *the two* Terms before. See this Act *Poſtea*.

No Money to be taken to excuse Perſons from ſerving.

" It is further enacted, That no Sheriff, Under Sheriff, Bailiff or other Officer, or Perſon whatſoever, ſhall directly or indirectly take or receive any Money or other Reward, to excuſe any Perſon from ſerving, or being impannel to ſerve on Juries, or under that Colour or Pretence, and that no Bailiff or other Officer appointed by any Sheriff or Under-Sheriff to impannel Juries, ſhall impannel any Perſon to ſerve thereon, other than ſuch, whoſe Name is ſpecified in a Mandate ſigned by ſuch Sheriff or Under-Sheriff, and directed to ſuch Bailiff or other Officer; and if any Sheriff, Under-Sheriff, Bailiff or other Officer, ſhall wilfully tranſgreſs in any the Caſes aforeſaid, any Judge or Juſtice of Aſſize, *Niſi prius* or Gaol Seſſions aforeſaid, or the Judge or Judges of the Seſſions for the ſaid Counties Palatine, may and is hereby required on Examination and Proof of ſuch Offence, in a ſummary Way, Penalty. to ſet a Fine or Fines upon any Perſon or Perſons ſo offending, as he ſhall think meet, not exceeding ten Pounds, according to the Nature of the Offence."

And whereas by the ſaid Act 7 & 8 W. 3. and by the 3 & 4 Ann. all Conſtables, Tythingmen and Headboroughs, are obliged to give in true Liſts at the reſpective Quarter Seſſions of the Peace holden for each County, Riding or Diviſion, of the Names and Places of all Perſons within their reſpective Precincts or Places, qualified to ſerve on Juries, as the Juſtices of Peace in open Court, which hath by Experience been found inconvenient and expenſive to ſeveral Conſtables, Tythingmen and Headboroughs, ſuch Quarter Seſſions being often held at a great Diſtance from their Abode; For Remedy whereof

whereof it is enacted, 'That from and after the said first Day of *September* one thousand seven hundred and thirty, it shall be lawful and sufficient for all or any Constables, Tithingmen, or Headboroughs, after they shall have made and compleated such Lists of Persons qualified to serve on Juries for their respective Parishes or Precincts, according to the Manner directed by the before mentioned Acts, and this present Act, to subscribe the same in the Presence of one or more Justice or Justices of the Peace for each respective County or Place, and also at the same Time to attest the Truth of such Lists upon Oath to the best of their Knowledge or Belief, which Oath such Justice or Justices respectively are hereby empowered and required to administer; and the said Lists shall (being first signed by the said Justices respectively, before whom the same shall be attested on Oath, and subscribed as aforesaid) be delivered by the said Constables, Tithingmen or Headboroughs, to the Chief or High Constables of the Hundreds or Divisions whereunto the same shall respectively belong, who are hereby directed and required to deliver in such Lists to the Justices of the Peace for the County, Riding or Division, at their respective General Quarter-Sessions in open Court, attesting at the same Time upon Oath their Receipt of such Lists from the Constables, Tithingmen or Headboroughs respectively, and that no Alteration hath been therein made since their Receipt thereof; and the said Lists, so delivered in and attested, shall be deemed as effectual as if they had been delivered in by the Constables, Tithingmen, or Headboroughs, for their respective Parishes or Precincts.'

Constables, &c. to subscribe their Lists before Justices, on Oath, &c.

And

Sheriff, &c. on Return of Writs of *Venire facias* to annex a Panel of Jurors, &c.

' And it is alſo further enacted, That from ' and after the twenty-fifth Day of *December* ' one thouſand ſeven hundred and thirty, every ' Sheriff, or other Officer, to whom the Re- ' turn of the *Venire facias juratores*, or other ' Proceſs for the Trial of Cauſes before Juſtices ' of Aſſize, or *Niſi prius*, in any County in *Eng-* ' *land*, doth or ſhall belong, ſhall, upon his Re- ' turn of every ſuch Writ of *Venire facias* (unleſs ' in Cauſes intended to be tried at Bar, or in ' Caſes where a ſpecial Jury ſhall be ſtruck by ' Order or Rule of Court) annex a Panel to the ' ſaid Writ, containing the Chriſtian and Sur- ' names, Additions, and Places of Abode, of ' a competent Number of Jurors, named in ſuch ' Liſts as qualified to ſerve on Juries, the Names ' of the ſame Perſons to be inſerted in the Pa- ' nel annexed to every *Venire facias*, for the ' Trial of all Iſſues at the ſame Aſſizes in each ' reſpective County; which Number of Jurors ' ſhall not be leſs than forty-eight in any County, ' nor more than ſeventy-two, without Direc- ' tion of the Judges appointed to go the Circuit, ' and ſit as Judges of Aſſize, or *Niſi prius*, in ' ſuch County, or one of them, who are reſpec- ' tively hereby impowered and required, if he ' or they ſee Cauſe, by Order under his or their ' reſpective Hand or Hands, to direct a greater ' or leſſer Number, and then ſuch Number as ' ſhall be ſo directed ſhall be the Number to ' ſerve on ſuch Jury; and that the Writs of *Ha-* ' *beas Corpora juratorum*, or *Diſtringas*, ſubſe- ' quent to ſuch Writ of *Venire facias juratores*, ' need not have inſerted in the Bodies of ſuch ' reſpective Writs the Names of all the Perſons ' contained in ſuch Panel; but it ſhall be ſuffi- ' cient to inſert in this Mandatory Part of ſuch

' Writs

'Writs respectively, *Corpora separalium personarum in panello huic brevi annexo nominatarum*, or Words of the like Import, and to annex to such Writs respectively, Panels containing the same Names as were returned in the Panel to such *Venire facias*, with their Additions and Places of Abode, that the Parties concerned in any such Trials may have timely Notice of the Jurors, who are to serve at the next Assizes, in order to make their Challenges to them, if there be Cause; and that for the making the Returns and Panels aforesaid, and annexing the same to the respective Writs, no other Fee or Fees shall be taken, than what are now allowed by Law to be taken, for the Return of the like Writs and Panels annexed to the same; and that the Persons named in such Panels shall be summoned to serve on Juries at the then next Assizes or Sessions of *Nisi prius*, for the respective Counties to be named in such Writs, and no other.'

Return of Jurors in *Wales*;

'And it is enacted, That every Sheriff, or other Officer, to whom the Return of Juries for the Trial of Causes in the Court of Grand Sessions in any County of *Wales* do or shall belong, shall, at least eight Days before every Grand Sessions, summon a competent Number of Persons qualified to serve on Juries, out of every Hundred and Commote within every such County, so as such Number be not less than ten, or more than fifteen, without the Directions of the Judge or Judges of the Grand Sessions held for such County, who is and are hereby impowered, if he or they shall see Cause, by Rule or Order of Court, to direct a greater or lesser Number to be summoned out of every such Hundred and Commote respectively;

'ſpectively; and that the ſaid Officer and Officers, who ſhall ſummon ſuch Perſons, ſhall 'return a Liſt containing the Chriſtian and Surnames, Additions and Places of Abode, of 'the Perſons ſo ſummoned to ſerve on Juries, 'the firſt Court of the ſecond Day of every 'Grand Seſſions; and that the Perſons ſo ſummoned, or a competent Number of them, as 'the Judge or Judges of ſuch Grand Seſſions 'ſhall direct, and no other, ſhall be named in 'every Panel to be annexed to every Writ of '*Venire facias juratores*, *Habeas Corpora juratorum*, and *Diſtringas*, that ſhall be iſſued out 'and returnable for the Trial of Cauſes in ſuch 'Grand Seſſions.'

and Counties Palatine of *Cheſter*, *Lancaſter* and *Durham*.

'And it is further enacted, That every She'riff or other Officer, to whom the Return of 'the *Venire facias juratores*, or other Proceſs 'for the Trial of Cauſes before the Juſtices of 'the Courts or Seſſions to be held for the 'Counties Palatine of *Cheſter*, *Lancaſter* or '*Durham*, doth belong, ſhall, fourteen Days 'at the leaſt before the ſaid Courts or Seſſions 'ſhall reſpectively be held, ſummon a competent Number of Perſons qualified to ſerve on 'Juries, ſo as ſuch Number be not leſs than 'forty-eight, nor more than ſeventy-two, without the Direction of the Judge or Judges of 'the Courts or Seſſions to be held for ſuch 'Counties Palatine reſpectively, and ſhall, eight 'Days at leaſt before ſuch Courts or Seſſions 'ſhall reſpectively be held, make or cauſe a 'Liſt to be made of the Perſons ſo ſummoned 'to ſerve on Juries, containing their Chriſtian 'and Surnames, Additions and Places of Abode; 'and the Liſt ſo made ſhall forthwith be publickly hung up in the Sheriff's Office, to be

'inſpected

‘ inſpected and read by any Perſon or Perſons ‘ whatſoever; and that the Perſons named in ‘ ſuch Liſt, and no other, ſhall be ſummoned ‘ to ſerve on Juries at the next Courts or Seſ- ‘ ſions to be held for the ſaid reſpective Coun- ‘ ties Palatine; and the ſaid Sheriff, or other ‘ Officer, is hereby required to return ſuch Liſt ‘ on the firſt Day of the Court or Seſſions to be ‘ held for the ſaid Counties Palatine reſpectively; ‘ and the Perſons ſo ſummoned, or a compe- ‘ tent Number of them, as the Judge or Judges ‘ of ſuch Courts or Seſſions reſpectively ſhall ‘ direct, and no other, ſhall be named in every ‘ Panel, to be annexed to every Writ of *Venire* ‘ *facias juratores*, *Habeas corpora juratorum* and ‘ *Diſtringas*, that ſhall be iſſued out and return- ‘ able for the Trial of Cauſes in ſuch Courts or ‘ Seſſions reſpectively.’

Names of Perſons impanelled to be written, and delivered to the Marſhal of the Aſſize, and put in a Box to be drawn, *&c.*

‘ And it is further enacted, That the Name ‘ of each and every Perſon, who ſhall be ſum- ‘ moned and impanelled as aforeſaid, with his ‘ Addition and the Place of his Abode, ſhall be ‘ written in ſeveral and diſtinct Pieces of Parch- ‘ ment or Paper, being all, as near as may be, ‘ of equal Size and Bigneſs, and ſhall be deli- ‘ vered unto the Marſhal of ſuch Judge of Aſ- ‘ ſize, or *Niſi prius*, or of the ſaid Great Seſſi- ‘ ons, or of the Seſſions for the ſaid Counties ‘ Palatine, who is to try the Cauſes in the ſaid ‘ County, by the Under-Sheriff of the ſaid ‘ County, or ſome Agent of his; and ſhall, by ‘ Direction and Care of ſuch Marſhal be rolled ‘ up all, as near as may be, in the ſame Man- ‘ ner, and put together in a Box or Glaſs, to ‘ be provided for that Purpoſe; and when any ‘ Cauſe ſhall be brought on to be tried, ſome ‘ indifferent Perſon, by Direction of the Court,

‘ may

'may and ſhall in open Court draw out twelve 'of the ſaid Parchments or Papers one after an- 'other; and if any of the Perſons, whoſe Names 'ſhall be ſo drawn, ſhall not appear, or be chal- 'lenged and ſet aſide, then ſuch further Num- 'ber, until twelve Perſons be drawn who ſhall 'appear, and after all Cauſes of Challenge ſhall 'be allowed as fair and indifferent; and the 'ſaid twelve Perſons ſo firſt drawn, and appear- 'ing and approved as indifferent, their Names 'being marked in the Panel, and they being 'ſworn ſhall be the Jury to try the ſaid Cauſe; 'and the Names of the Perſons ſo drawn and 'ſworn ſhall be kept apart by themſelves in ſome 'other Box or Glaſs to be kept for that Purpoſe, 'till ſuch Jury ſhall have given in their Verdict, 'and the ſame is recorded, or until ſuch Jury 'ſhall, by Conſent of the Parties, or Leave of 'the Court, be diſcharged; and then the ſame 'Names ſhall be rolled up again, and returned 'to the former Box or Glaſs, there to be kept 'with the other Names remaining at that Time 'undrawn, and ſo *toties quoties*, as long as any 'Cauſe remains then to be tried.'

Where the Jury have not brought in their Verdict, twelve others to be drawn.

'Provided always, That if any Cauſe ſhall 'be brought on to be tried in any of the ſaid 'Courts reſpectively, before the Jury in any 'other Cauſe ſhall have brought in their Ver- 'dict, or be diſcharged, it ſhall and may be 'lawful for the Court to order twelve of the 'Reſidue of the ſaid Parchments or Papers, not 'containing the Names of any of the Jurors, who 'ſhall not have ſo brought in their Verdict, or 'be diſcharged, to be drawn in ſuch Manner as 'is aforeſaid, for the Trial of the Cauſe, which 'ſhall be ſo brought on to be tried.

'And

'And it is further enacted, That every Per- Penalty on
'ſon or Perſons, whoſe Name or Names ſhall Defaulters.
'be ſo drawn as aforeſaid, and who ſhall not ap-
'pear after being openly called three Times,
'upon Oath made by ſome credible Perſon that
'ſuch Perſon ſo making Default had been law-
'fully ſummoned, ſhall forfeit and pay for every
'Default in not appearing upon Call, as afore-
'ſaid (unleſs ſome reaſonable Cauſe of his Ab-
'ſence be proved by Oath or Affidavit, to the
'Satisfaction of the Judge, who ſits to try the
'ſaid Cauſe) ſuch Fine or Fines not exceeding
'the Sum of five Pounds, and not leſs than forty
'Shillings, as the ſaid Judge ſhall think rea-
'ſonable to inflict or aſſeſs, for ſuch Default.

'Provided always, That where a View *(a)* Method in
'ſhall be allowed in any Cauſe, that in ſuch Caſe caſe of View.
'ſix of the Jurors named in ſuch Panel, or more,
'who ſhall be mutually conſented to by the Par-
'ties or their Agents on both Sides, or if they
'cannot agree, ſhall be named by the proper
'Officer of the reſpective Courts of *King's Bench*,
'*Common Pleas*, *Exchequer*, at *Weſtminſter*, or
'the Grand Seſſion in *Wales*, and the ſaid Coun-
'ties Palatine, for the Cauſes in their reſpective
'Courts, or if need be, by a Judge of the re-
'ſpective Courts where the Cauſe is depending,
'or by the Judge or Judges before whom the
'Cauſe ſhall be brought on to Trial reſpectively,
'ſhall have the View, and ſhall be firſt ſworn,
'or ſuch of them, as appear upon the Jury to
'try the ſaid Cauſe, before any Drawing, as
'aforeſaid, and ſo many only ſhall be drawn to
'be added to the Viewers who appear, as ſhall,

(a) Note; that a Juror withdrawn in order to a View may be ſworn on the Jury afterwards. 1 *Str.* 70.

'after

'after all Defaulters and Challengers allowed, 'make up the Number of twelve to be ſworn 'for the Trial of ſuch Cauſe.'

'And whereas ſome Doubt hath been conceiv- 'ed touching the Power of his Majeſty's Courts 'of Law at *Weſtminſter*, to appoint Juries to be 'ſtruck before the Clerk of the Crown, Maſter 'of the Office, Prothonotaries, or other proper 'Officer of ſuch reſpective Courts, for the Trial 'of Iſſues depending in the ſaid Courts, without 'the Conſent of the Proſecutor or Parties concern- 'ed in the Proſecution or Suit then depending, 'unleſs ſuch Iſſues are to be tried at the Bar of the 'ſame Courts; It is declared and enacted by the 'Authority aforeſaid, That it ſhall and may be 'lawful to and for his Majeſty's Courts of *King's* 'Bench, *Common Pleas* and *Exchequer*, at *Weſt-* 'minſter, reſpectively, upon Motion made on 'Behalf of his Majeſty his Heirs or Succeſſors, 'or on the Motion of any Proſecutor or Defen- 'dant in any Indictment or Information for any 'Miſdemeanor or Information in the Nature of 'a *Quo Warranto*, depending or to be brought 'or proſecuted in the ſaid Court of *King's Bench*, 'or in any Information depending or to be 'brought or proſecuted in the ſaid Court of *Ex-* 'chequer, or on the Motion of any Plaintiff or 'Plaintiffs, Defendant or Defendants in any 'Action, Cauſe or Suit whatſoever, depending 'or to be brought and carried on in the ſame 'Courts of *King's Bench*, *Common Pleas* and *Ex-* 'chequer, or in any of them; and the ſaid Courts 'are hereby reſpectively authorized and requi- 'red upon Motion as aforeſaid, in any of the 'Caſes before mentioned, to order and appoint 'a Jury to be ſtruck, before the proper Officer 'of each reſpective Court, for the Trial of any 'Iſſue

In Trials of Iſſues at *Weſtminſter*, on Motion of Parties, Judges may order a ſpecial Jury.

'Iſſue joined in any of the ſaid Caſes, and triable by a Jury of twelve Men, in ſuch Manner as ſpecial Juries have been and are uſually 'ſtruck in ſuch Courts reſpectively, upon Trials 'at Bar had in the ſaid Courts; which ſaid Jury 'ſo ſtruck as aforeſaid, ſhall be the Jury returned for the Trial of the ſaid Iſſue.

'And it is enacted, That the Perſon or Party, who ſhall apply for ſuch Jury to be ſtruck as aforeſaid, ſhall bear and pay the Fees for the ſtriking ſuch Jury, and ſhall not have any Allowance for the ſame, upon Taxation of Coſts.' Perſon applying for ſuch Jury, to pay the Fees.

'Provided always, and it is thereby further enacted, That where any ſpecial Jury ſhall be ordered by Rule of any of the ſaid Courts to be ſtruck by the proper Officer of ſuch Court, in the Manner aforeſaid, in any Cauſe ariſing in any City, or County of a City or Town, the Sheriff or Sheriffs, or Under-Sheriff of ſuch City, or County of a City or Town, ſhall be ordered by ſuch Rule to bring, or cauſe to be brought before the ſaid Officer, the Books or Liſts of Perſons qualified to ſerve on Juries within the ſame, out of which Juries ought to be returned by ſuch Sheriff or Sheriffs, in like Manner, as the Freeholders Book hath been uſually ordered to be brought, in order to the ſtriking of Juries for Trials at the Bar, in Cauſes ariſing in Counties at large; and in every ſuch Caſe the Jury ſhall be taken and ſtruck out of ſuch Books or Liſts reſpectively.' Where ſpecial Juries in Cities are appointed, the Jury to be taken out of Liſts of Perſons qualified.

'And it is enacted, That any Perſon or Perſons, having any Eſtate in Poſſeſſion in Land, in their own Right, of the yearly Value of twenty Pounds or upwards, over and above Who are qualified to be inſerted in the Liſts,

'the reſerved Rent payable thereout, ſuch Lands 'being held by Leaſe or Leaſes for the abſolute 'Term of five hundred Years or more, or for 'ninety-nine Years, or any other Term, de-'terminable on one or more Life or Lives, the 'Names of every ſuch Perſon or Perſons ſhall 'and may, and are hereby directed and requi-'red to be inſerted in the reſpective Liſts as afore-'ſaid, in order to their being inſerted in the 'Freeholders Book; and the Perſons appointed 'to make ſuch Liſts are hereby directed to in-'ſert them accordingly; and ſuch Leaſeholder 'or Leaſeholders ſhall and may be ſummoned 'or impanelled to ſerve on Juries, in like Man-'ner as Freeholders may be ſummoned and im-'panelled by Virtue of this, or any other Act 'or Acts of Parliament for that Purpoſe, and 'be ſubject to the like Penalties for Non-ap-'pearance; any Law, Statute, Uſe, or Cuſtom 'to the contrary notwithſtanding.'

or to ſerve in *London*.

'And it is further enacted, That the Sheriffs 'of the City of *London*, for the Time being, 'ſhall not impanel or return any Perſon or Per-'ſons, to try any Iſſue joined in any of his Ma-'jeſty's Courts of *King's Bench*, *Common Pleas* 'and *Exchequer*, or to be or ſerve on any Jury 'at the Seſſions of *Oyer* and *Terminer*, Gaol-'Delivery, or Seſſions of the Peace, to be had 'or held for the ſaid City of *London*, who ſhall 'not be an Houſholder within the ſaid City, 'and have Lands Tenements, or perſonal Eſtate 'to the Value of one hundred Pounds; and the 'ſame Matter and Cauſe alledged by Way of 'Challenge, and ſo found, ſhall be taken and 'admitted as a principal Challenge, and the Per-'ſon or Perſons ſo challenged, ſhall and may be 'examined on Oath of the Truth of the ſaid 'Matter.' 'And

'And it is further enacted, That the Sheriffs, 'or other Officers, to whom the returning of 'Juries doth or shall belong, for any County, 'City, or Place respectively, shall not impanel 'or return any Person or Persons to serve on 'any Jury for the Trial of any Capital Offence, 'who, at the Time of such Return, would not 'be qualified in such respective County, City, 'or Place, to serve as Jurors in Civil Causes for 'that Purpose; and the same Matter and Cause 'alledged by Way of Challenge, and so found, 'shall be admitted and taken as a principal 'Challenge, and the Person or Persons so chal-'lenged shall and may be examined on Oath of 'the Truth of the said Matter.'

Return of Juries in Capital Cases.

This Act was made perpetual by Stat. *6 Geo.* 2. *c.* 37.

'And by Stat. 4 *Geo.* 2. *c.* 7. It is enacted, 'That from and after the first Day of *May* in 'the Year of our Lord one thousand seven hun-'dred and thirty-one, the fourth Section of the 'said Act, or any Part thereof, shall not extend 'or be construed to extend to the County of '*Middlesex*.'

After 1 *May* 1731. Clause in the Jury Act not to extend to *Middlesex*.

'Provided always, and it is enacted by the Au-'thority aforesaid, That no Person shall be re-'turned to serve as a Juror at any Session of '*Nisi prius* in the County of *Middlesex*, who 'has been returned to serve as a Juror at any 'such Session of *Nisi prius* in the said County, 'in the two Terms or Vacations next immedi-'ately preceding, under such Penalty upon the 'Sheriff, Under-Sheriff, Bailiff or other Offi-'cer employed or concerned in the summoning 'or returning of Jurors in the said County of '*Middlesex*, as might have been inflicted upon 'them, or any of them, for any Offence against 'the said recited Clause.'

None to be returned, who has been returned in the two Terms preceding.

Leaſeholders, where the improved Rents amount to 50 *l. per Ann.* liable to ſerve on Juries.

'And whereas by the very frequent Occaſions there are for Juries in the County of *Middleſex*, and by the ſmall Number of Freeholders, that are in the ſaid County, the Sheriffs of the ſaid County may be under Difficulties in procuring Juries to anſwer the Purpoſes of this Act; for Remedy whereof it is enacted by the Authority aforeſaid, That all Leaſeholders upon Leaſes, where the improved Rents or Value ſhall amount to fifty Pounds, or upwards, *per Annum*, over and above all Ground-Rents, or other Reſervations, payable by Virtue of the ſaid Leaſes, ſhall be liable and obliged to ſerve upon Juries, when they ſhall be legally ſummoned for that Purpoſe; any Thing in this or any former Act to the contrary notwithſtanding.'

CHAP. IX.

Of Challenges (*a*) *to the Array*, &c.

1 Inſt. 155. *b.* 156. Challenges.

YOU have already ſeen of what *Viſne* the Jury ought to be: The next Thing to be conſidered is concerning *Challenges*.

Challenge is a Word common, as well to the *Engliſh* as to the *French*, and ſometimes ſignifieth to claim, and the *Latin* Word is *Vindicare*; ſometimes in Reſpect of Revenge, to challenge into the Field, and then it is called in *Latin*, *Vindicare* or *provocare*; ſometimes in Reſpect of *Partiality or Inſufficiency*, to chal-

(*a*) One challenged ſworn as a Tales-Man, ill. *Str.* 640.

lenge

lenge in Court Perſons returned on a Jury. And ſeeing there is no proper *Latin* Word to ſignify this particular Kind of Challenge, they have framed a Word anciently written *Chalumniare*, and *Columpniare*, and *Calumpniare*, and now written *Calumniare*, and hath no Affinity with the Verb *Calumnior*, or *Calumnia*, which is derived of that, for that is of a quite other Senſe, ſignifying a *falſe Accuſer*; and in that Senſe *Bracton* uſeth *Calumniator*, to be a falſe Accuſer: But it is derived of the old Word *Caloir* or *Chaloir*, which in one Signification is to care for, or foreſee. And for that to challenge Jurors, is the Mean to care for, or foreſee, that an indifferent Trial be had, it is called *Calumniare*, to challenge, that is, to except againſt them that are returned to be Jurors, and this is its proper Signification. But ſometimes a Summons, *Summonitio*, is ſaid to be *Calumniata*, and a Count to be challenged, but this is improperly. And foraſmuch as Mens Lives, Fames, Lands and Goods, are to be tried by Jurors, it is moſt neceſſary that they be *Omni exceptione majores*; and therefore I will handle this Matter more largely. *Calumniator.*

A Challenge to the Jurors is twofold, either to the Array, or to the Polls: To the Array of the *principal Panel*, and to the Array of the *Tales*. And herein you ſhall underſtand that the Jurors Names are ranked in the Panel one under another, which Order or Ranking the Jury, is called the Array, and the Verb, *to array* the Jury, and ſo we ſay in common Speech *Battail Array*, for the Order of the Battail. And this Array we call *Arraiamentum*, to make the Array, *Arraiare*, derived of the *French* Word *Arroier*; ſo as to challenge *Ibid.* Challenge is two fold. To the Array. Array.

the Array of the Panel, is at once to challenge or except againſt all the Perſons ſo arrayed or impanelled, in Reſpect of the Partiality or Default of the Sheriff, Coroner, or other Officer that made the Return.

Ibid. Principal Challenges.

And it is to be known, that there is a *principal Cauſe* of Challenge to the Array, and a Challenge to the *Favour*; principal in Reſpect of Partiality; as firſt, If the Sheriff or other Officers be of Kindred or Affinity to the Plaintiff or Defendant, if the Affinity continue. Secondly, If any one or more of the Jury be returned at the Denomination of the Party, Plaintiff or Defendant, the whole Array ſhall be quaſhed. So it is, if the Sheriff return any one, that he be more favourable to the one than to the other, all the Array ſhall be quaſhed. Thirdly, If the Plaintiff or Defendant have an Action of Battery againſt the Sheriff, or the Sheriff againſt either Party, this is a good Cauſe of Challenge. So if the Plaintiff or Defendant have an Action of Debt againſt the Sheriff; (but otherwiſe it is, if the Sheriff have an Action of Debt againſt either Party); or if the Sheriff have Parcel of the Land depending upon the ſame Title, or if the Sheriff, or his Bailiff which returned the Jury, be under the Diſtreſs of either Party; or if the Sheriff or his Bailiff be either of Counſel, Attorney, Officer in Fee, or of Robes, or Servant of either Party, Goſſip, or Arbitrator in the ſame Matter, and treated thereof. And where a Subject may challenge the Array for Unindifferency, there the King being a Party, may alſo challenge for the ſame Cauſe, as for Kindred, or that he hath Part of the Land, or the like; and where

where the Array ſhall be challenged againſt the King, you may read in our Books.

The Challenge to the Array is, in Reſpect to the Cauſe of *Indifferency or Default* of the *Sheriff* or other *Officer that made the Return*, and not in Reſpect of *the Perſons returned*. For if the Challenge to the *Array* be found againſt the Party that takes it, he ſhall yet have his particular Challenge to the *Polls*; and the Reaſon why the Array or Panel may be challenged, is, becauſe the Cauſe doth not appear *upon Record*, and there is no other Way to take Advantage of it, which is likewiſe the Reaſon of challenge to the Polls. *Vin. Trial*, 224.

A Challenge was offered to the Array, for that it was made by *J. S.* as Sheriff of *Bucks*, who was made Sheriff in *Mich.* Term 1687. and had not taken the Oaths required by Stat. 25 *Car.* 2. and ſo his Office was made void; but it was diſallowed by the Court, for he is *de facto* Sheriff. 2 *Vent.* 58.

The Defendant challenged the Array becauſe it was returned by *J. S.* as Sheriff, two Days after he had received his Writ of Diſcharge; and the Court diſallowed the Challenge, becauſe contrary to the Record. *Cro. Eliz.* 369.

In Ejectment, the Plaintiff ſuggeſteth that his Leſſor, the Sheriffs and Coroners were Tenants to a Dean and Chapter, whoſe Intereſt was concerned, and prayed the *Venire facias* to *Eliſors*, and had it, being confeſſed by the Defendant, and the Court took it as a principal Challenge. *Vide Hut.* 24. *Moor* 470. *Roll. Rep.* 328. *Duncomb* and *Ingleby*, *Trin.* 15 *Car.* 2. *B. R.*

Challenging the Array of a ſpecial Jury for the Sheriff's being intereſted, not a Contempt. 2 *Str.* 1000.

A Prayer to *Eliſors* in Trials at Bar may be at the Suit of the Defendant or Plaintiff, but in *Niſi prius* at the Prayer of the Plaintiff only; and *per Cur'*, It is a principal Challenge that the Plaintiff's Leſſor is Sheriff or Kindred, and if the Plaintiff doth not pray, *&c.* the Defendant may challenge the Array at the Aſſizes. Lord *Brook*'s Caſe, *Trin.* 1657. *B. R.*

It is a good Challenge to the Array, that the Array is made and returned by two Coroners only, when there are four in the County, and that the Writ is returned by one of the Sheriffs of *London* only. So if a Bailiff return them that are out of his Franchiſe, or if an Array be to be, of Perſons out of a Franchiſe and Guildable, and the Bailiff return them, for the Sheriff ought to make it; and that ſome of the Panel were returned by the Bailiff of a Franchiſe, where the whole Panel is returned as Array by the Sheriff, this is a good Challenge to the Array, for otherwiſe the Parties would loſe their Challenge to the Array made by the Bailiff. *Roll.* Tit. *Trial*, 636.

By what Perſon.

If the Defendant ſue the Writ of *Habeas Corporas* by *Proviſo*, at the Return, the Plaintiff may challenge the Array for Kindred between the Defendant and the Sheriff. *D.* 15 *Eliz.* 319. 13. *Rol. Trial*, 637.

What Conſanguinity is ſufficient.

D. 15 *Eliz.* 319. The Array was quaſhed although the Sheriff was the *Ninth* in Deſcent, and the Tenant in the *ſeventh* Deſcent from the Anceſtor of whom both deſcended, Couſin to the Party's Wife, although herſelf no Party. So if the Wife be dead, if Iſſue be alive, theſe are good Challenges to the Array. *Dyer* 37. *Roll. Trial*, 637, 638.

Alliance

Alliance to one Party is a good Challenge. For Affinity.

If the Sheriff be allied at the making of the Panel, and be dead at the Challenge, yet this is a good Challenge. It is no Challenge that the Sheriff became of Kin after making the Panel: Nor can the Array be challenged after a Juror is sworn, or appear full, for it then comes too late. *Vin. Trial*, 241. At what Time.

It is no Challenge to the Array, if all the Jurors be of Affinity.

It may be after a *Tales* prayed, for no Challenge can be until the Jury is full. If the Suggestion of Cousinage to have the *Venire facias* to the Coroners, be denied, and the *Venire facias* is awarded to the Sheriff, the same Challenge shall not be allowed to the Array, but any other Cause may be alledged, than what was before denied. Roll. Trial, 644. *pl.* 6.

Favourably made by the Sheriff or his Bailiff, or the Bailiff of a Franchise, is a good Challenge. That the Sheriff is within the Distress of a Party, or Servant to the Plaintiff, of the Robes of the Plaintiff, was Arbitrator for a Party, is Procurator, and Maintainer of a Party: That the Sheriff purchased Part of the Land in Question: That the Panel was made by the Bailiff of the Franchise of the other Party: These are good Challenges to the Array. For Favour. 1 Inst. 156. Roll. Trial, 638.

It is no principal Challenge that one Party is Tenant or Servant to the Sheriff, but it is a good Challenge for Favour. *Ibid.*

It is a good Challenge to the Array. That the Sheriff made the Array, or put a Juror into the Panel at the Denomination of any of the Parties, in Favour to them, or of their Servants, or of one interested, or of a Maintainer, or of the Counsel, or of a Procurator. *Ibid.* 640. Denomination.

Not

Not if Strangers by the Sheriff's Leave make the Panel, or it be made at the Requeſt of both Parties. *Ibid. pl. 13.* 1 *Inſt.* 156.

For Malice. It is a good Challenge to the Array, that one of the Parties has brought an Action of Debt againſt the Officer that returns that Panel, or that there is a Difference betwixt the Officer and the Party; that the Officer killed his Servant. *Ibid.* 642.

Ibid. But not that the Officer has Debt againſt the Party, for he may demand his Debt without Malice.

An Action brought for *every Debate* will not be the Cauſe of a principal Challenge, unleſs it be in ſuch Actions, in which there is either *Malice*, *Grief*, or *Revenge*; in ſuch Caſes theſe are principal Challenges, but not otherwiſe.

So if an Action be brought in which the *good Name* and Fame of the Party be touched, or in Actions which concern *Life*, *Honeſty*, *Maihem*, it is a principal Challenge to ſuch that he hath ſuch Action depending againſt the Sheriff. *Vin. Trial*, 235.

Where a Man challenges the Array, and does not verify his Plea with *Et hoc paratus eſt verificare*, yet the Challenge is good; for the Entries do not direct it, and the Court will not vary from the Entries. *Ibid.* 237.

How, and in what Manner the Challenge is to be made, Roll. Trial, 642. The Challenge ought to be, *quod tempore Panelli prædict' Arraiati* the Sheriff was Couſin to the Wife of the Defendant, *&c.* not afterwards nor before, unleſs you aver that ſhe was alive, or had Iſſue at the making the Panel.

If the Challenge be taken for Couſinage, it ought to be ſhewn *cement* Couſin, but in ſuch a Challenge to be a Juror, it is not neceſſary to *Ibid.*

ſhew

ſhew *coment* Couſin: But *per Br. Challenges*, pl. 56. he ought to ſhew *coment*.

The Matter and Conveyance of the Couſinage alledged in a Challenge, is not traverſable. You may traverſe the Couſinage *prout* without *modo & forma*. If the Challenge be, that the Sheriff was Couſin to the Plaintiff, or within his Diſtreſs; it is no Counterplea to ſay he is likewiſe of Kin to the Defendant, or within his Diſtreſs alſo. What Counterplea of a Challenge is good, and how to be pleaded.

In Treſpaſs againſt *B* Feoffee to the Uſe of *C*. The Sheriff is Couſin to *B*. but not to *C*. the Plaintiff may challenge the Array. So where the Panel was returned by *H*. the Sheriff and *M. the Under Sheriff*, and *M*. was Couſin to the Plaintiff, and ſhews *coment*, this was allowed a principal Challenge to the Array. But in *Caſe* upon a Surmiſe *by the Plaintiff*, that the *Under Sheriff* was his Couſin, and ſhewed *coment*, and becauſe the Defendant did not deny it, the *Venire* was awarded to the Coroners; and after Verdict and Judgment, the Judgment was held erroneous, and not aided by the Statute. *Vin. Trial*, 227.

So in Ejectment after Not guilty pleaded, it was ſurmiſed that the Sheriff was of *Conſanguinity* to the Leſſor of the Plaintiff, which being confeſſed, the *Venire* was awarded to the Coroners. This Challenge was afterwards adjudged inſufficient, and a new *Venire* awarded, for it was no principal Challenge, and did not conclude to the Favour; and it is no *principal Challenge*, that the Sheriff is *Couſin* to the Leſſor of the Plaintiff, as the Leſſor cannot hinder the Action of the Leſſee. *Ibid.*

If a Panel be returned by the Sheriff who is a *Party concerned*, or Member of a *Body politick concerned*,

concerned, it is a good Cauſe of Challenge, of which the Court is to be appriſed by Suggeſtion of the Party, and the *Venire* then goes to the Coroners at firſt; but the Want of a proper *Venue* was never yet a Challenge to the Array, as it is in the *Caſe* of *Affinity* to either Party, or *intereſted*, or *not qualified* to make a Return, or had made it at the *Requeſt* of either Party, or where the Cauſe concerns a Corporation of which the Sheriff is a Member. *Ibid.* 232.

If it be preſented that *J. S.* hath made a Nuſance to *London* and *le gents*, it is no Challenge to the Array, to ſay the Sheriff of *Middleſex* is deputed and removable by the Commonalty of *London*, becauſe this is the Suit of the King.

The King may make his Challenge, that the Sheriff is within the Party's Diſtreſs, although every Subject owes greater Favour and Obedience to the King, by Reaſon of his Allegiance, than to any Lord by Reaſon of Tenure.

In a Writ of Right, or any other Writ, a Baron of the Realm may excuſe himſelf.

What Perſons may be impanelled.

In a Writ of Right, the Inqueſt ought to be all Knights. A Banneret may be impanelled in this Writ; ſo may a Serjeant, if there be not Chivalers covenable.

In an Attaint upon a Recovery by falſe Verdict in an Aſſiſe, ſome Knights ought to be returned; and if there be not any in the Hundred where the Land lies, they ſhall be returned out of the County.

By Default of the Sheriff; as when the Array of a Panel is returned by a Bailiff of a Franchiſe, and the Sheriff return it as of himſelf, this ſhall be quaſhed, becauſe the Party ſhall loſe his Challenges. But if a Sheriff re-

1 Inſt. 156.

return

turn a Jury within a Liberty, this is good, and the Lord of the Franchiſe is driven to his Remedy againſt him.

If a Peer of the Realm, or Lord of Parliament be Demandant or Plaintiff, Tenant or Defendant, there muſt be two or more Knights returned of his Jury, be he Lord Spiritual or Temporal, or elſe the Array may be quaſhed: But if they be returned, although they appear not, yet the Jury may be taken of the Reſidue. And if others be joined with the Lord of Parliament, yet if there be no Knight returned, the Array ſhall be quaſhed againſt all. So in an Attaint, there ought to be a Knight returned to the Jury.

Where there muſt be a Knight returned of the Jury. 1 Inſt. 156.

Note; This Challenge may be taken by the Peer, but not by the other Party, who is not a Peer, for it is only the Privilege of a Peer. *Modern Reports* 2, 26.

In an Aſſiſe between *Newdigate*, Plaintiff, and the Earl of *Darby* and others Defendants; the Array was challenged by the Earl becauſe he was a Peer of the Realm, and had a Seat in Parliament; and that the Array was made by *A.* and *B.* Sheriff of *Middleſex*, *Nullo Milite in eodem panello nominato nec retornato.* To this the Plaintiff demurred; and the Court held the Challenge good, and ordered a new Panel to be made. *Q.* If he was Plaintiff, and would not challenge for that Cauſe, if the Defendant ſhall have ſuch Challenge; it ſeemeth that he ſhall not. *Dyer* 107. *b.* *Vin. Trial*, 225.

In Ejectment in *Ireland* of Lands on the Demiſe of Lady *Conway*; at the Trial the Defendant challenged the Array, for that the Leſſor of the Plaintiff was a Counteſs; that the Ejectment was to try her Title, and that ſhe bore the Coſts of the Suit, and proſecuted the ſame; and that the Sheriff had made that Array *Nullo Milite*

Milite in eodem existen' retornat'. To this the Plaintiff demurred; and upon a Writ of Error in *B. R.* here the Court held, that the Defendant might take Advantage of the two Knights not being returned, as well as the Plaintiff, notwithstanding the Opinion in *Dyer* 107. *b.* And that in Ejectment, as well as in any other Action; the Lessor being the real, and the other only the nominal Plaintiff. 2 *Show.* 423.

In an Information for a Riot against several; at the Trial a Challenge was offered, because the Lord *Grey* was one of the Defendants, who was a Peer, and that no Knights were returned on the Panel; and held a good Challenge. 2 *Show.* 262.

If two *Peers* sue as *Gentlemen*, and admit themselves so in Pleading; 'tis no Challenge to say, no Knight is returned; for the Sheriff is in no Fault.

Where the King is Party. 1 Inst. 156.

And when the King is Party, as in Traverse of an Office, he that traverseth may challenge the Array, as hereafter in this Section shall appear, and so it is in Case of Life: And likewise the King may challenge the Array, and this shall be tried by Triors, according to the usual Course. The Array challenged on both Sides shall be quashed.

Ibid.

And if two Estrangers make a Panel, and not in a favourable Manner for the one Party or the other, and the Sheriff returns the same, the Array was challenged for this Cause, and adjudged good. It is therefore common for the Officers of the Court, by the Direction of the Judges to give a Panel to the Sheriff which he returns; whence it seems the Court hath the Power to compel the Sheriff to make his Return, and

they may fine him if a ſufficient Jury doth not appear according to the Precept of the Writ.

It is no good Cauſe of Challenge to the Array to ſay, that the Jury ſhould come out of different Counties. *Vin. Trial*, 224, 5.

If the Bailiff of a Liberty return any out of his Franchiſe, the Array ſhall be quaſhed, as an Array returned by one that hath no Franchiſe ſhall be quaſhed. *Ibid.*

Challenge to the Array for Favour: He that taketh this muſt ſhew in certain the Name of him that made it, and in whoſe Time, and all in Certainty; this Kind of Challenge being no principal Challenge, muſt be left to the Diſcretion and Conſcience of the Triors; as if the Plaintiff or Defendant be Tenant to the Sheriff, this is no principal Challenge, for the Lord is in no Danger of his Tenant; but *e converſo* it is a principal Challenge; but in the other he may challenge for Favour; and leave it to Trial. So Affinity between the Son of the Sheriff, and the Daughter of the Party, or *e converſo*, or the like, is no principal Challenge, but to the Favour; but if the Sheriff marry the Daughter of either Party, or *e converſo*, this (as hath been ſaid) is a principal Challenge, or the like. But where the King is Party, one ſhall not challenge the Array for Favour, *&c.* becauſe in reſpect of his Allegiance, he ought to favour the King more. But if the Sheriff be a Vadelect of the Crown, or other menial Servant of the King, there the Challenge is good, and likewiſe the King may challenge the Array for Favour. Challenge to the Favour. 1 Inſt. 156. For the King.

Note; Upon that which hath been ſaid it appeareth, that the Challenge to the Array is in Reſpect of the Cauſe of Unindifferency, or Default of the Sheriff, or other Officer that made the To the Array. 1 Inſt. 156.

the Return, and not in the Reſpect of the Perſons returned, where there is no Unindifference or Default in the Sheriff, *&c.* for if the Challenge to the Array be found againſt the Party that takes it, yet he ſhall have his particular Challenge to the Polls.

To the Polls. 1 Inſt. 156. *b.*

In ſome Caſes a Challenge may be had to the Polls, and in ſome Caſes not at all. Challenge to the Polls is a Challenge to the particular Perſons, and theſe be of four Kinds, that is to ſay, Peremptory, Principal, which induce Favour, and for Default of Hundredors.

Peremptory Challenge. *Ibid.*

Peremptory; this is ſo called, becauſe he may challenge peremptorily upon his own Diſlike, without ſhewing of any Cauſe; and this only is in Caſe of Treaſon or Felony, *in favorem vitæ*; and by the Common Law, the Priſoner upon an Indictment or Appeal might challenge thirty-five, which was under the Number of three Juries; but now by the Statute of 22 *H.* 8. the Number is reduced to twenty in Petit Treaſon, Murder and Felony; and in Caſe of High Treaſon, and Miſpriſion of High Treaſon, it was taken away by the Statute of 32 *H.* 8. But now by the Statute of 1 *&* 2 *Phil. & Mar.* the Common Law is revived, for in Treaſon, the Priſoner ſhall have his Challenge to the Number of thirty-five; and ſo it hath been reſolved by the Juſtices, upon Conference between them in the Caſe of Sir *Walter Raleigh* and *George Brooks:* But all this is to be underſtood when any Subject, that is not a Peer of the Realm, is arraigned for Treaſon or Felony. But if he be a Lord of Parliament, and a Peer of the Realm, and is to be tried by his Peers, he ſhall not challenge any of his Peers at all; for they are not ſworn as other Jurors be, but find the Party Guilty

No Challenge of Peers.

or

or Not guilty, upon their Faith or Allegiance to the King, and they are Judges of the Fact, and every of them doth ſeparately give his Judgment, beginning at the loweſt. But a Subject under the Degree of Nobility may, in Caſe of Treaſon or Felony, challenge for juſt Cauſe, as many as he can, as ſhall be ſaid hereafter. In an Appeal of Death againſt divers, they plead Not guilty, and one joint *Venire facias* is awarded; if one challenge peremptorily, he ſhall be drawn againſt all; otherwiſe it is of ſeveral *Venire facias's*.

Of Challenges by the King.

The King, or any on his Behalf, may on ſufficient Cauſe, challenge either the Array or the Polls, in the ſame Manner as a private Perſon may; alſo by the Common Law, the King, without aſſigning any Reaſon, but barely alledging *quod non ſunt boni pro Rege*, might have challenged peremptorily as many as he thought proper.

But this is remedied by 33 *E.* 1. which enacteth as follows; 'Of Inqueſts to be taken before any of the Juſtices, and wherein our Lord the King is Party, howſoever it be, it is agreed and ordained by the King and all his Counſel, that from henceforth, notwithſtanding it be alledged by them that ſue for the King, that the Jurors of thoſe Inqueſts, or ſome of them, be not indifferent for the King, yet ſuch Inqueſts ſhall not remain untaken for that Cauſe; but if they that ſue for the King will challenge any of thoſe Jurors, they ſhall aſſign of their Challenge a Cauſe certain, and the Truth of the ſame Challenge ſhall be inquired of according to the Cuſtom of the Court.'

It hath been clearly ſettled, that the Words of this Stat. being general, it extends to all

Cauſes, as well *Criminal* as Civil, whereto the King is Party. *Moor* 595. *Co. Lit.* 159.

The King may challenge the Array for Favour, ſo he may the Polls; but a Man ſhall not have ſuch Challenge *againſt* the King. *Vin. Trial*, 243.

In an Information for Forgery the King's Counſel challenged a Juror, and being preſſed to ſhew the Cauſe, the Court held, that if the Panel ſhould be gone through firſt, and if there were Jurors enough without thoſe challenged, the King is not to ſhew any Cauſe. 1 *Vent.* 309. And the like was done in Lord *Grey*'s *Caſe*, *Raymond* 473. See alſo *Co. Lit.* 156. *Skin.* 82. 2 *H. H. P. C.* 271.

Principal Challenge to the Polls. 1 Inſt. 156. b.

Principal; ſo called, becauſe, if it be found true, it ſtandeth ſufficient of itſelf without leaving any Thing to the Conſcience or Diſcretion of the Triors. Of a principal Cauſe of Challenge to the *Array*, we have ſpoke ſomewhat already; now it followeth with like Brevity, to ſpeak of principal Challenges to the *Polls*, (that is) ſeverally to the Perſons returned.

A principal Challenge is nothing elſe but ſuch Matter which proves evident Favour or Enmity in the Juror; and therefore it belongeth to the Juſtices to draw the Juror, and not to leave the Diciſion to Triors. 21 *Ed.* 4. 11. *Roll. Trial*, 649. *pl.* 1.

To the Polls. 1 Inſt. 156. b.

Principal Challenges to the Polls may be reduced to four Heads; Firſt, *Propter Honoris reſpectum*, for reſpect of Honour. Secondly, *Propter Defectum*, for Want or Default. Thirdly, *Propter Affectum*, for Affection or Partiality. Fourthly, *Propter Delictum*, for Crime or Delict.

Firſt,

First, *Propter Honoris respectum:* As any Peer of the Realm, or Lord of Parliament, as a Baron, Viscount, Earl, Marques and Duke; for these in respect of Honour and Nobility, are not to be sworn on Juries; and if neither Party will challenge him, he may challenge himself; for by *Magna Charta* it is provided, *Quod nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ.* Now the Common Law hath divided all the Subjects into Lords of Parliament, and into the Commons of the Realm. The Peers of the Realm are divided into Barons, Viscounts, Earls, Marquesses and Dukes; the Commons are divided into Knights, Esquires, Gentlemen, Citizens, Yeomen and Burgesses: And in Judgment of Law any of the said Degrees of Nobility are Peers to another: As if an Earl, Marques or Duke be to be tried for Treason or Felony, a Baron, or any other Degree of Nobility, is his Peer. In like Manner a Knight, Esquire, *&c.* shall be tried *per Pares*, and that is by any of the Commons, as Gentlemen, Citizens, Yeomen or Burgesses; so as when any of the Commons is to have a Trial, either at the King's Suit, or between Party and Party, a Peer of the Realm shall not be impanelled in any Case.

Principal Challenges to the Polls. *Ibid.* *Propter honoris respectum.*

A Peer may challenge himself.

Peers and Commons.

Secondly, *Propter Defectum.* *Ibid.*

1. *Patriæ*, As Aliens born. Challenge, *Propter defect'.*

2. *Libertatis*, As Villeins or Bondmen, and so a Champion must be a Freeman.

3. *Annui census, i. e. liberi tenementi.*

First, What yearly Freehold a Juror ought to have, that passeth upon Trial of the Life of a Man, or in a Plea real, or in a Plea personal, *Ibid.* See before *cap.* 7.

Quorum quilibet habeat 4l. &c.

where the Debt or Damage in the Declaration amounteth to forty Marks. *Vide Littleton, sect.* 464. Secondly, This Freehold must be in his own Right, in Fee-simple, Fee-tail, for Term of his own Life, or for another Man's Life, although it be upon Condition, or in Right of his Wife, out of Ancient Demesne; for Freehold within Ancient Demesne will not serve: But if the Debt or Damage amounteth not to forty Marks, any Freehold sufficeth. Thirdly, He must have Freehold in that County where the Cause of the Action ariseth, and though he hath in another, it sufficeth not. Fourthly, If after his Return he selleth away his Land, or if *Cestuique vie*, or his Wife dieth, or an Entry be made, for the Condition broken, so as his Freehold be determined, he may be challenged for Insufficiency of Freehold.

In Cases of Treason and Felony, at Common Law, Want of Freehold was no Cause of Challenge; *probos & legales homines* was sufficient. The Statute of 2 *H.* 5. is gone as to that by the Statute of 1 & 2 of Queen *Mary*. See the Lord *Russel*'s Trial, *July* 13, 1683. *State Trials*, Vol. 3. p. 135.

It seems before the Statute 2 *H.* 5. in Actions where the Freehold was concerned, the Jurors ought to have some Freehold. 3 *H.* 4. 4. By that Statute in all Pleas real and personal, where the Debt or Damage, or both together amount to forty Marks, the Juror must have forty Shillings Freehold. In an Attaint they must be able to expend twenty Pounds *per Annum*. *Roll.* Tit. *Trials*, *f.* 648.

In an Account, upon the Receipt of one hundred Shillings, if he count to his Damage two hundred Shillings, if the Juror hath but twenty Shillings, or under forty Shillings, 'tis sufficient,

ſufficient, becauſe he ſhall not recover Damages; and ſo this is not within the Statute 10 *H.* 6. 18. For the Sufficiency of Jurors, ſee *Roll.* Tit. *Trials*, 648. *pl.* 14.

A Man ſeiſed of a Manor of *Dale*, enfeoffs a Stranger upon Condition to pay yearly to *J. S.* and his Heirs, forty Shillings Rent. *J. S.* dies ſeiſed of this Rent, and then his Heir takes it, yet the Heir hath not ſufficient Freehold.

Land to the Value of forty Shillings is given to the Huſband and Wife, and the Heirs of their two Bodies begotten, who had Iſſue a Son; the Huſband gives the Land by Fine to an Eſtranger and his Heirs, and dies, the Wife enters and dies ſeiſed; the Son hath not ſufficient Freehold to be a Juror.

A Man ſeiſed of Land to the Value of forty Shillings within the County of *Middleſex*, and of Land to the Value of twelve within the County of *Suſſex*, and grants a Rent-Charge of forty Shillings, iſſuing out of all the ſaid Land to a Stranger in Fee; the Grantee hath ſufficient Freehold to be a Juror in both Counties. See many ſpeculative Caſes upon this Subject, in *Williams* his Reading upon the Statute 35 *H.* 8. *cap.* 6.

It was held that the Statute, as to Jurors being Freeholders, don't extend to Juries in Corporate Towns. 1 *Ventris* 366. *Raymond* 485.

4. *Hundredorum:* Firſt, By the Common Law in a Plea real, mix'd and perſonal, there ought to be four of the Hundred (where the Cauſe of Action ariſeth) returned for their better Notice of the Cauſe; for *Vicini vicinorum facta præſumuntur ſcire.* And now, ſince *Littleton* wrote, in a Plea perſonal, if two Hundre-

1 Inſt. 157. Challenges *propter defectum hundredorum.*

dors appear, it sufficeth; and in an Attaint, though the Jury is double, yet the Hundredors are not double. Secondly, If he hath either Freehold in the Hundred, though it be to the Value of but Half an Acre, or if he dwell there, though he hath no Freehold in it, it sufficeth.

Hundredors.

Thirdly, If the Cause of the Action riseth in divers Hundreds, yet the Number shall suffice as if it had come out of one, and not several Hundredors out of each Hundred. Fourthly, If there be divers Hundreds within one Leet or Rape, if he hath any Freehold, or dwell in any of those Hundreds, though not in the proper Hundred, it sufficeth. Fifthly, If the Jury come *de Corpore Comitatus*, or *de proximo Hundredo*, where one Party is Lord of the Hundred, or the like, there need no Hundredors be returned at all. Sixthly, If a Hundredor, after he be returned, sell away his Land within that Hundred, yet shall he not be challenged for the Hundred, for that his Notice remains; otherwise, as hath been said, for his Insufficiency of Freehold, for his Fear to offend, and to have Lands wasted, *&c.* which is one of the Reasons of Law, is taken away. Seventhly, He that challengeth for the Hundred, must shew in what Hundred it is, and not drive the other Party to shew it. Eighthly, His Challenge for the Hundred is not *simpliciter*, but *secundum quid*; for though it be found that he hath nothing in the Hundred, yet shall he not be drawn, but remain *præter H.* that is besides for the Hundred; and albeit he dwelleth, or hath Land in the Hundred, yet must he have sufficient Freehold.

No Hundredors.

Note; This Challenge for Want of Hundredors must be given in Writing presently, and

and the other Party is to demur thereto, if oppoſed.

If a Challenge be, that there is not any Hundredor returned, it may be averred to the Court, that there is not any ſufficient within the Hundred, which is not within the Fee of the Plaintiff; although this be not returned by the Sheriff, and if this be found true by Triors, the Array ſhall be affirmed. 45 *Aſſ.* 1. *Roll. Trial*, 634. *pl.* 6.

If the King be made Party by Aid Prayer, and ſufficient Hundredors do not appear, nor are returned, yet the Panel ſhall not be quaſhed, but a *Tales* of the Hundred ſhall be returned. But betwixt common Perſons in ſuch Caſes, the Panel ſhall be quaſhed, and this ſhall not only be a Challenge to the Heads. 25 *E.* 3. 43. *Ibid. pl.* 7, 8.

If the Sheriff return *quod non ſunt pluries del Hundred*, he ſhall take of the Hundred adjoining, which ſhall be ſufficient. 19 *H.* 6. 48. *Ibid. pl.* 5.

If the Juror hath ſufficient Land within the Hundred, although he doth not dwell within the Hundred, yet he is a ſufficient Hundredor. 9 *H.* 6. 66. *Ibid.* 635. Nay, though he dwell in another County.

If he be not Hundredor at the Return of the *Venire*, but at the Return of the *Diſtringas*, yet this doth not take away the Challenge.

After four are ſworn, or after a Challenge to the Polls, there can be no Challenge for the Hundred. *Roll.* Tit. *Trial*, 636. *pl.* 15. At what Time the Challenge muſt be.

Who ſhall be ſufficient *Hundredor*, ſee *Williams* his Reading aforeſaid.

If he dwell or have Aſſets within the Leet, Rape, Franchiſe or Vill, where the *Venue* is, he is a ſufficient Hundredor.

If he hath Aſſets in Rent, Common of any Sort, Market, Fair, Piſcary, Toll, Paſſage, Leet, Office of Bailiwick, *&c.* he is a ſufficient Hundredor; otherwiſe of an Advowſon, *&c.*

A Jury being ready at the Bar in *B. R.* Serjeant *Earl* challenged the Array for want of Hundredors. *Econtra:* It was inſiſted that the Jury by Rule of Court was returned by the Secondary, and that the Hundredors were ſtruck out by Conſent; but the Court held it a good Challenge notwithſtanding the Conſent. *Style* 233.

In an Information in the Nature of a *Quo warranto* againſt the Defendant for acting as Mayor of *Tiverton*, the Defendant entered into the common Rule, by Conſent, for the Maſter to ſtrike the Jury, who accordingly ſtruck forty-eight: The Defendant ſtruck out twelve of theſe, and the Proſecutor ſtruck off twelve more; and the Sheriff returned the remaining twenty-four as the Jury to try the Cauſe; but the Defendant having artfully ſtruck out all the Hundredors named by the Maſter at the Aſſizes, challenged the Array for want of Hundredors. The Court held that the Challenge was good, but that the Rule being made by the Defendant's Conſent, this Challenge was a Contempt of the Court; and granted an Attachment againſt the Defendant for the ſame. *Rex* v. *Burridge*, *T.* 10 *Geo.* 1. *B. R.*

1 Inſt. 157. Challenge *propter affectum.*

3. *Propter affectum*; and this is of two Sorts, either working a principal Challenge, or to the Favour. And again a principal Challenge is of two Sorts, either by Judgment of Law, with-

out any Act of his, or by Judgment of Law upon his own Act.

And it is said, that a principal Challenge is, when there is express Favour, or express Malice. First, without any Act of his; as if the Juror be of Blood or Kindred to either Party, *Consanguineus*, which is compounded *ex con & sanguine, quasi eodem sanguine natus*, as it were issued from the same Blood; and this is a principal Challenge; for that the Law presumeth that one Kinsman doth favour another before a Stranger; and how far remote soever he is of Kindred, yet the Challenge is good. And if the Plaintiff challenge a Juror for Kindred to the Defendant, it is no Counter-plea, to say that he is of Kindred also to the Plaintiff, though he be in a nearer Degree. For the Words of the *Venire facias* forbid the Juror to be of Kindred to either Party.

Ibid. Principal Challenge. Kindred, Sid. 2 Part 155.

If a Body Politick or Incorporate, sole or aggregate of many, bring any Action that concerns their Body Politick or Incorporate, if the Juror be of Kindred to any that is of that Body, although the Body Politick or Incorporate can have no Kindred, yet, for that those Bodies consist of natural Persons, it is a principal Challenge. A Bastard cannot be of Kindred to any, and therefore it can be no principal Challenge. And here it is to be known, that *Affinitas*, Affinity, hath in Law two Senses. In its proper Sense it is taken for that Nearness that is gotten by Marriage, *Cum duæ cognationes inter se divisæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur Affinis.* In a larger Sense *Affinitas* is taken also for Consanguinity and Kindred, as in the Writ of *Venire facias*, and otherwhere. Affinity or Alliance by Marriage is a principal

Bodies Politick. 1 Inst. 157. Affinity.

principal Challenge, and equivalent to Conſanguinity, when it is between either of the Parties; as if the Plaintiff or Defendant marry the Daughter or Couſin of the Juror, or the Juror marry the Daughter or Couſin of the Plaintiff or Defendant, and the ſame continues, or Iſſue be had. But if the Son of the Juror hath married the Daughter of the Plaintiff, this is no principal Challenge, but to the Favour, becauſe it is not between the Parties. Much more may be ſaid hereof; *ſed ſumma ſequor faſtigia rerum.*

Peremptory Challenge upon Record.

As if he hath formerly tried the Cauſe, although reverſed by Error, or upon the ſame Title; if the Record be not ſhewed, this Challenge is not peremptory. *For he that grounds a Challenge upon a Record*, &c. *ought to have the Record ready.* 33 *H.* 6. 55. The Record ought to be exemplified. 21 *E.* 4. 74. *Roll. Trial*, 649. *pl.* 1.

'Tis a good Challenge to ſay the Juror was attainted in an Attainder, or Writ of Conſpiracy; but Attainder in a Writ of Forgery of falſe Deeds upon the Statute 1 *H.* 5. 2. (but 'tis upon 5 *Eliz.* 14.) is not, becauſe this Attainder is given of late Time by the Statute 33 *H.* 6. 55. *Ibid. pl.* 2, 4, 5.

In a Writ of Conſpiracy, 'tis a principal Challenge, That the Juror was one of the Indictors, although the Trial is now of the Conſpiracy, and not upon the firſt Point, *viz.* the Felony. *Ibid. pl.* 9.

In Treſpaſs, if one juſtify as Maſter, and the other as Servant; 'tis not a principal Challenge to ſay the Juror paſſed in the firſt Iſſue for the Maſter, but he ought to conclude, *& iſſint* favourable. 18 *E.* 4. 12. *Ibid. pl.* 7.

If

If two plead Not guilty, and first one Issue is tried, and then the other is tried, 'tis no Challenge to say the Juror tried the other Issue, and gave Damages, of which Damages he shall be charged if he be attainted in an Attaint; for perhaps the Defendant will be found Not guilty. *Ibid. pl.* 8.

That the Juror is within the *Distress* of any of the Parties, is a good Cause of Challenge. And so it is, if he be within the *Distress* of any Person concern'd, although no Party to the Action. As within the *Distress* of *A.* the Master of the Defendant, who justifies as Servant to *A.* by Reason of his Freehold; and the Issue is *sur le franktenement*. So for him in Reversion received, within the Distress of the Tenant for Life. And so in an Action by the Tenant for Life, within the Distress of him in Reversion: These are good Challenges. *Ibid.* 650. *pl.* 1, 2, 3. *Diens* Distress.

So in an Action by Dean and Chapter, within the Distress of the Chapter, or one of the Chapter, are good Challenges. *Ibid. pl.* 8.

Consanguinity of the Half Blood is a principal Challenge: If the Juror be at the ninth Degree, if it can be shewed, it is good. Principal for Consanguinity *Ibid.* 652. *pl.* 1, 3, *Ibid. pl.* 10, 11.

In an Action by the Dean and Chapter, or Mayor and Commonalty, Brother to one of the Commonalty, or to one of the Canons, is a good Challenge: So to any Person concerned in Interest, although no Party to the Action. As Cousin to the Patron, or the Parson, *&c.* so in Attaint to one of the *Petit* Jury. *Ibid.* 653. *pl.* 36.

But in an *Ejectione firmæ*, and Not guilty pleaded, 'tis no Challenge to the Array, that the Sheriff is Cousin to the Lessor of the Plaintiff;

tiff; for it doth not appear that the Title of him in Reverſion ſhall be in Queſtion, and he in Reverſion is no Party to the Action: See it ſo adjudged upon Demurrer, *Roll.* Tit. *Trial*, 653. But now in our feigned Ejectments it is otherwiſe, becauſe the Title of the Leſſor is only in Queſtion.

Principal for Affinity.

1 Inſt. 157. b.

'Tis a good Challenge that the Juror is Goſſip to the Plaintiff, *& ſic e converſo*; and ſo although the Son be dead; for the Spiritual Affinity remains, and ſo is *Curat* of the Juror. That the Juror hath married the Siſter of the Party; that the Daughter of the Uncle of the Juror hath married the Uncle of the Party; Couſin to the Wife of the Party; theſe are good Challenges, although the Wife, *&c.* is dead, if her iſſue be alive; otherwiſe if ſhe be dead without Iſſue, for then the Cauſe of the Favour is determined.

But it is no Challenge to ſay, the Juror is Brother to one who married the Siſter of the Party, nor that the Son of the Party married the Siſter of the Juror, becauſe theſe are not Parties to the Action. *Roll. Trial*, 654. *pl.* 10. 11.

In an Attaint it is a good Challenge to the Juror, that he hath married the Siſter of the Wife of one of the *Petit* Jury, for the Alliance. *Ibid. pl.* 17.

Principal for Favour.

If a Juror declare the Right of one Party, or give his Verdict before-hand, or take Money, this is a principal Challenge; but if he promiſe a Party, this is not a principal Challenge, but for Favour. *Ibid.* 655. *pl.* 6, 7, 8.

Principal for Malice.

If the Action depending betwixt the Party and Juror, be ſuch as implieth Malice, this is a good

a good Challenge; but not if it imply no Malice. *Ibid.* 656. *pl.* 1.

That the Party hath an Appeal depending againſt the Juror, or the Juror againſt him, or Action of Battery. That they are in Debate and Wrangling, *&c.* are good Challenges. Not Actions of Debt or Treſpaſs *Quare Clauſum fregit*, *&c.* Nor that the Brother, *&c.* of the Party, hath Actions againſt the Juror. *Ibid.*

That the Juror was born out of the King's Ligeance; for although he came into *England* an Infant, and is ſworn to the King, yet he continues an Alien; and that he is outlawed, for then he is not *legalis homo*, are good Challenges. *Ibid.* 657. *pl.* 2. Peremptory. Alien.

If the Juror ſays, That he will paſs for one Party becauſe he knows the Verity of the Matter, this is no Challenge; but if he ſays it is for Favour, it is a good Challenge, if the Triors find he ſpoke for Favour, and not for Truth. *Ibid. pl.* 2, 3. For Favour.

In an Action betwixt the King and a Party, the Subject cannot take any Challenge for Favour, as in an Indictment of Barretry, *&c.* the Defendant cannot challenge a Juror for Favour to the King. *Ibid. pl.* 1, 2. King.

After the Array is affirmed, there ſhall not be ſuch Challenge to a Juror, which would have been a ſufficient Challenge to the Array. As it is not a good Challenge that the Juror was impanelled at the Denomination of a Party, for this had been a good Challenge to the Array. *Ibid.* 658. *pl.* 1, 2. At what Time Challenges may be taken.

If a Man challenge a Juror for Non-ſufficiency of Freehold, and this is adjudged againſt him, yet he may challenge for Favour; and this ſhall be tried. 10 *H.* 6. 18. *Ibid. pl.* 3.

If

If the Jury upon finding of the principal do not tax the Damages, for which the *Venire facias* iſſues to the ſame Jurors, to tax the Damages, the Parties cannot take any Challenge for a Cauſe before the firſt Trial. But for a Cauſe ariſing after they may. And ſo againſt *les primer Jurors*. *Ibid. pl.* 5, 6.

King. The King cannot challenge a Juror after he is ſworn, unleſs it be for a Cauſe ariſing after he is ſworn. *Ibid. pl.* 9.

In what Caſes he which challenges ought to ſhew the Cauſe preſently. If the Defendant challenge the Array which is found againſt him, or he releaſe the Challenge, and the Array is affirmed, and afterwards he challenge a Juror; he ought to ſhew the Cauſe preſently. *Ibid.* 659. *pl.* 1, 2.

But if there be two Defendants, and one challenge the Array, and afterwards both challenge a Juror; the other ſhall not ſhew Cauſe preſently. *Ibid. pl.* 3.

If a Juror be challenged, and there be enough of the Panel beſides, the Cauſe of Challenge need not be ſhewed unleſs the other Side challenges *touts peravail.*

If any of the Jurors be ſworn, and there be not ſufficient, for which a *Tales* is granted, and at the Return one of the *primer* Jurors is challenged, the Cauſe ought to be ſhewed preſently, he being ſworn before. *Roll. Trial*, 659. *pl.* 4.

King. In an Action between the King and a common Perſon, as in an Indictment of Barretry, Preſentment of Nuſance, *&c.* the Defendant, if he challenges any Juror, muſt ſhew the Cauſe preſently. *Ibid. pl.* 5.

But in an Inqueſt betwixt the King and a Stranger, the Stranger need not ſhew the Cauſe preſently;

preſently; for in this Caſe the King is as a common Perſon of the Realm. *Ibid. pl.* 9.

Cauſe ought to be ſhewed before the *Tales* be peruſed in Caſe of a common Perſon. *Ibid.* 660. *pl.* 1.

If both Parties challenge, although for ſeveral Cauſes, as if one be for Favour, and the other Peremptory; yet the Juror ſhall be drawn without ſhewing Cauſe. *Ibid. pl.* 2. *Treat.*

It may be in an Inqueſt before the Sheriff to inquire of Waſte, both to the Array and Polls. *Ibid. P. pl.* 1. In what Inqueſt a Challenge may be.

But not in an Inqueſt of Office, as in a Writ of Inquiry of Damages. *Ibid. pl.* 2.

In a Writ of Right, a Challenge may be to the Polls *del* 4 *Chivalers* returned. *Ibid.* 661. *pl.* 4.

Not of Coſinage to the Witneſſes coming to try the Deed in an Aſſize. *Ibid. pl.* 5.

If one Party challenge the Array, which is affirmed, and afterwards challenge a Juror, he ought to ſhew Cauſe preſently; and this ſhall be tried preſently; but otherwiſe of the other, who did not take the Challenge to the Array. *Ibid.* 661. *S. pl.* 1, 2. Trial and Triors, and Challengers.

The Challenge of him who firſt challenged, ſhall be firſt tried; although the firſt be for Favour, and that of the others be *Riens diens H.* *Ibid. T. pl.* 1.

If the *Venue* be of two Counties, and both Panels challenged, the *Eſliſors* ſhall be one of one Panel, and the other of the other. *Ibid.* 663. *pl.* 1.

If the Array be challenged, the Court to try the Array may chooſe two Triors, according to their Diſcretion. 29 *Aſſ.* 15. 19 *H.* 6. 9.

If an Action be depending between the Juror and one of the Parties, and for this he is challenged, and the other ſays, that this is brought What Challenge they may try.

by

by Covin; the Triors may try this; for although the Action is of Record, yet the Covin is not. *Roll. Trial*, 664. *pl.* 10.

Evidence. The Juror may be examined upon a *Voier dire*, to any Challenge that is not to his Dishonour; but the Triors are not bound by his Oath. *Ibid.* 665. *A.*

The Triors after they are sworn may go at large by Assent of the Parties until another Day. *Ibid.* 666. *pl.* 9.

In what Cases a Challenge or Affirmance by one shall serve for others. In Trespass against two who plead to Issue, and a *Venire facias* is returned, although one accept the Array, yet the other may challenge it; and if it be found, the Array shall be quashed against all. So in an Appeal against Principal and Accessary, for one shall not disinherit the other. *Ibid.* 662. *pl.* 8.

But in an Appeal by two, if the Defendant challenge a Juror, and one of the Plaintiffs agree to this, the other shall not be received to say, that this is by Covin, but the Juror shall be drawn, in Favour to the Life of Man.

And yet in a *Præcipe quod reddat* by two, and the Tenant challenge the Array, because the Sheriff is Gossip to one of the Demandants, and one Demandant acknowledge the Challenge, the other may say that this is not so, and have it tried. *Roll.* Tit. *Trial*, 662, *&c. pl.* 7.

Ley Gager. In *Gager de Ley* none shall be challenged for Favour or Insufficiency, *&c.*

Cousinage. If there be a Challenge for Cousinage, he that takes the Challenge must shew how the Juror is Cousin. But yet if the Cousinage, that is, the Effect and Substance be found, it sufficeth; for the Law preferreth that which is material before that which is formal. 1 *Inst.* 157.

If

If the Juror have Part of the Land that dependeth upon the ſame Title. *Ibid.* Depending on the ſame Title.

If a Juror be within the Hundred, Leet, or any Way within the Seigniory, immediately or mediately, or any other Diſtreſs of either Party, this is a principal Challenge. But if either Party be within the Diſtreſs of the Juror, this is no principal Challenge, but to the Favour. *Ibid.* Diſtreſs.

If a Witneſs named in the Deed be returned of the Jury, it is a good Cauſe of Challenge of him. So if one within Age of one and twenty be returned, it is a good Cauſe of Challenge. *Ibid.* Witneſs. Infant.

Upon his own Act, as if the Juror hath given a Verdict before for the ſame Cauſe, albeit it be reverſed by Writ of Error, or if after Verdict Judgment were arreſted. So if he hath given a former Verdict upon the ſame Title or Matter, though between other Perſons. But it is to be obſerved, that I may ſpeak once for all, that in this or other like Caſes, he that taketh the Challenge muſt ſhew the Record, if he will have it take Place as a principal Challenge, otherwiſe he muſt conclude to the Favour, unleſs it be a Record of the ſame Court, and then he muſt ſhew the Day and Term. *Ibid.* Challenges ariſing from the Juror's own Act. Former Verdict.

So likewiſe one may be challenged, that he whas Indictor of the Plaintiff or Defendant, either of Treaſon, Felony, Miſpriſion, Treſpaſs, or the like in the ſame Cauſe. Indictment. 1 Inſt. 157. b.

If the Juror be Godfather to the Child of the Plaintiff or Defendant, or *e converſo*, this is allowed to be a good Challenge in our Books. Godfather. *Ibid.*

If a Juror hath been an Arbitrator choſen by the Plaintiff or Defendant, in the ſame Cauſe, and hath been informed of, or treated of the Matter, this is a principal Challenge. Other- Arbitrator. 1 Inſt. 157. b.

wise if he were never informed, nor treated thereof; and otherwise if he were indifferently chosen by either of the Parties, though he treated thereof. But a Commissioner chosen by one of the Parties, for Examination of Witnesses in the same Cause, is no principal Cause of Challenge; for he is made by the King under the Great Seal, and not by the Party as the Arbitrator is, but he may upon Cause be challenged for Favour.

Commissioner.

Arbitrator in another Matter, is no Cause of Challenge.

Counsel. 1 Inst. 157. b.

If he be of Counsel, Servant, or of Robes or Fee of either Party, it is a principal Challenge.

Eat or drink at the Parties Charge. 1 Inst. 157. b.

If any, after he be returned, do eat and drink, at the Charge of either Party, it is a principal Cause of Challenge; otherwise it is of a Trior after he be sworn.

In an Information of Forgery, the Defendant challenged one of the Jury, for that the Prosecutor had been lately entertained at his House; and held a good Challenge to the Favour. 1 *Vent.* 309.

Actions of Malice. 1 Inst. 157. b.

Action brought either by the Juror against either of the Parties, or by either of the Parties against him, which may imply Malice or Displeasure, are Causes of principal Challenge, unless they be brought by Covin, either before or after the Return; for if Covin be found, then it is no Cause of Challenge; other Actions which do not imply Malice or Displeasure, are to the Favour; as an Action of Debt, *&c.* *Moor* 3.

Parson and Parishes. *Ibid.*

In a Cause where the Parson of a Parish is Party, and the Right of the Church cometh in Debate, a Parishioner is a principal Challenge. Otherwise it is in Debt, or any other Action, where

where the Right of the Church cometh not in Queſtion.

If either Party labour the Juror, and give him any Thing to give his Verdict, this is a principal Challenge. But if either Party labour the Juror to appear, and to do his Conſcience, this is no Challenge at all, but lawful for him to do it. To labour the Jury. *Ibid.*

That the Juror is a Fellow-Servant with either Party, is no principal Challenge, but to the Favour. Fellow-Servant. *Ibid.*

Neither of the Parties can take that Challenge to the Polls, which he might have had to the Array. To the Polls. *Ibid.*

Note; If the Defendant may have a principal Cauſe of Challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that Caſe may for his own Expedition alledge the ſame, and pray Proceſs to the Coroners, which he cannot have, unleſs the Defendant will confeſs it; but if the Defendant will not confeſs it, then the Plaintiff ſhall have a *Venire facias* to the Sheriff, and the Defendant ſhall never take any Challenge for that Cauſe, and ſo in like Caſes. But on the Part of the Defendant, any ſuch Matter ſhall not be alledged, and Proceſs prayed to the Coroners, becauſe he may challenge the Jury for that Cauſe, and can be at no Prejudice. *Ibid.* *Venire facias* to the Coroners.

Challenge concluding to the Favour, when either Party cannot take any principal Challenge, but ſheweth Cauſes of Favour, muſt be left to the Conſcience and Diſcretion of the Triors, upon hearing their Evidence, to find him favourable, or not favourable. But yet ſome of them come nearer to principal Challenges than other; as if the Juror be of Kindred, or under the Diſtreſs of him in the Reverſion or Remain- Challenge to the Favour. *Ibid.*

der, or in whoſe Right the Avowry or Juſtification is made, or the like: Theſe be principal Challenges, becauſe he in Reverſion, Remainder, or in whoſe Right the Avowry or Juſtification is, is not Party to the Record; otherwiſe it is, if they were made Parties by Aid, Receipt or Voucher, and yet the Cauſe of Favour is apparent; ſo it is of all principal Cauſes, if they were Party to the Record. Now the Cauſes of Favour are infinite, and thereof ſomewhat may be gathered of that which hath been ſaid, and the reſt I purpoſely leave the Reader to the Reading of in our Books concerning that Matter. For all which the Rule of Law is, That he muſt ſtand indifferent, as he ſtands unſworn.

Favour.

King. *Ibid.*

The Subject may challenge the Polls, where the King is Party. And if a Man be outlawed of Treaſon or Felony at the Suit of the King, and the Party for avoiding thereof alledgeth Impriſonment, or the like, at the Time of the Outlawry, though the Iſſue be joined upon a collateral Point, yet ſhall the Party have ſuch Challenges, as if he had been arraigned upon the Crime itſelf, for this by a Mean concerneth his Life alſo.

Challenges *propter delict'*. 1 Inſt. 158.

Propter delictum: As if the Juror be attainted or convicted of Treaſon or Felony, or for any Offence to Life or Member, or in Attaint for a falſe Verdict, or for Perjury as a Witneſs, or in a Conſpiracy at the Suit of the King, or in any Suit (either for the King or for any Subject) be adjudged to the Pillory, Tumbrel, or the like, or to be branded, or to be ſtigmatized, to have any other corporal Puniſhment, whereby he becometh infamous, (for it is a Maxim in Law, *Repellitur a ſacramento infamus*); theſe

Infamous.

theſe and the like are principal Cauſes of Challenge. So it is if a Man be outlawed in Treſpaſs, Debt, or any other Action, for he is *Exlex*, and therefore is not *legalis homo*. And old Books have ſaid, That if he be excommunicate, he could not be of a Jury. Outlawed.

A Baſtard may be of a Jury, yet may be challenged if he be of Kindred. *Jenk. Cent.* 1. *cap.* 90. Baſtard.

See the Statutes of *W.* 2. and *Artic. ſupra Chartas*, what Perſons the Sheriff ought to return on Juries. And ſee *F. N. B. breve de non ponendis in Aſſiſis & juratis*; and the Regiſter in the ſame Writ. And ſee there what Remedy the Party hath that is returned againſt Law. Who ought to be on Juries. 1 Inſt. 158.

It is neceſſary to be known, the Time when the Challenge is to be taken. Firſt, he that hath divers Challenges muſt take them all at once, and the Law ſo requireth indifferent Trials, that divers Challenges are not accounted double. Secondly, If one be challenged by one Party, if after he be tried indifferent, it is Time enough for the other Party to challenge him. Thirdly, After Challenge to the Array, and Trial duly returned, if the ſame Party take a Challenge to the Polls, he muſt ſhew Cauſe preſently. Fourthly, So if a Juror be formerly ſworn, if he be challenged, he muſt ſhew Cauſe preſently, and that Cauſe muſt riſe ſince he was ſworn. Fifthly, When the King is Party, or in an Appeal of Felony, the Defendant that challengeth for Cauſe, muſt ſhew his Cauſe preſently. Sixthly, if a Man, in Caſe of Treaſon or Felony, challenge for Cauſe, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, A Challenge for the Hundred muſt be taken *Ibid.* At what Time Challenges muſt be taken. Hundredors.

before ſo many be ſworn as will ſerve for Hundredors, or elſe he loſeth the Advantage thereof.

Writ of Right. *Ibid.* In a Writ of Right, the Grand Jury muſt be challenged before the four Knights, before they be returned in Court; for after they be returned into Court, there cannot any challenge be taken upon them.

The Array of the *Tales*. *Ibid.* *Nota*; The Array of the *Tales* ſhall not be challenged by any one Party, until the Array of the principal be tried; but if the Plaintiff challenge the Array of the Principal, the Defendant may challenge the Array of the *Tales*. After one hath taken Challenge to the Polls, he cannot challenge the Array.

Ibid. Now it is to be ſeen how Challenge to the Array of the principal Panel, or of the *Tales*, or of the Polls ſhall be tried, and who ſhall be Triors of the ſame, and to whom Proceſs ſhall be awarded.

Ibid. If the Plaintiff alledge a Cauſe of Challenge againſt the Sheriff, the Proceſs ſhall be directed to the Coroners; if any Cauſe againſt any of the Coroners, Proceſs ſhall be awarded to the reſt; if againſt all of them, then the Court ſhall appoint certian *Eliſors* or *Eſliſors*, (ſo named *ab eligendo*) becauſe they are named by the Court, againſt whoſe Return no Challenge ſhall be taken to the Array, becauſe they were appointed by the Court, but he may have his Challenge to the Polls. *Note*; If Proceſs be once awarded for the Partiality of the Sheriff, though there be a new Sheriff, yet Proceſs ſhall never be awarded to him; for the Entry is, *Ita quod Vicecomes ſe non intromittat.* But otherwiſe it is, for that he was Tenant to either Party, or the like.

Coroners.

Eliſors.

Ibid. Array. If the Array be challenged in Court, it ſhall be tried by two of them that be impanelled, to

be appointed by the Court; for the Triors in that Caſe, ſhall not exceed the Number of two, unleſs it be by Conſent. But when the Court names two, for ſome ſpecial Cauſe alledged by either Party, the Court may Name others; if the Array be quaſhed, then Proceſs ſhall be awarded *ut ſupra*. If there be a Demurrer to a Challenge, the Judge before whom the Cauſe is to be tried, may determine it, or adjourn it to be heard another Time. *Style* 464. *Vide Bulſtr.* 1 Part 114.

Two Triors.

Demurrer to a Challenge, how determinable.

If a Panel upon a *Venire facias* be returned, and a *Tales*, and the Array of the Principal is challenged, the Triors which try and quaſh the Array, ſhall not try the Array of the *Tales*; for now it is, as if there had been no Appearance of the principal Panel; but if the Triors affirm the Array of the Principal, then they ſhall try the Array of the *Tales*. If the Plaintiff challenge the Array of the Principal, and the Defendant the Array of the *Tales*, there the one of the Principal, and the other of the *Tales*, ſhall try both Arrays. For other Matter concerning the *Tales*, ſee in *Coke*'s Reports, Matters worthy of Obſervation. When any Challenge is made to the Polls, two Triors ſhall be appointed by the Court; and if they try one indifferent, and he be ſworn, then he and the two Triors ſhall try another; and if another be tried indifferent, and he be ſworn, then the two Triors ceaſe, and the two that be ſworn on the Jury ſhall try the reſt.

Array of the Principal and *Tales*. 1 Inſt. 158.

1 Inſt. 158. Two Triors.

If any of the Jury, after ſome of them be ſworn, be challenged, thoſe that are ſworn are to ſay, whether he that is challenged be indifferent or not. But if the firſt or ſecond Man be challenged, then the Court doth uſe to appoint

Trials of Challenges.

ſome of them, (whom it pleaſeth) that ſhall be afterwards ſworn to try the Indifferency of the Perſon challenged.

Rules concerning Challenges.

1. All Challenges muſt be taken before the Jurors are ſworn.

2. If one challenge a Juror, and it be found againſt the Challenger, he may not challenge the Juror for a ſecond Cauſe.

3. If one challenge the Array, and it be found againſt him, he may not afterward challenge any of the Polls, without ſhewing Cauſe preſently; and this ſhall be tried preſently.

4. No Challenge ſhall be admitted againſt the Triors appointed by the Court.

Trial of Challenges. 1 Inſt. 158.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is ſworn, becauſe one cannot try alone, there ſhall be added to him one challenged by the Plaintiff, and the other by the Defendant. When the Trial is to be had by two Counties, the Manner of the Trial is worthy of Obſervation, and apparent in our Books. If the four Knights in the Writ of Right be challenged, they ſhall try themſelves, and they ſhall chuſe the Grand Aſſize, and try the Challenges of the Parties. If the Cauſe of Challenges touch the Diſhonour or Diſcredit of the Juror, he ſhall not be examined upon his Oath, to inform the Triors. If an Inqueſt be awarded by Default, the Defendant hath loſt his Challenge; but the Plaintiff may challenge for juſt Cauſe, and that ſhall be examined and tried.

Juror examined.

View. 1 Inſt. 158. b.

Whereſoever the Plaintiff is to recover *per viſum juratorum*, there ought to be ſix of the Jury that have had the View, or known the Land in Queſtion, ſo as he be able to put the Plaintiff in Poſſeſſion, if he recover.

Trait

Trait doth signify the same as taken out or withdrawn, and is applied to a Juror, that is withdrawn by Consent, or removed and discharged by Challenge. *Trait*, what.

A Juror sick was withdrawn, and another sworn. *Palmer's Rep.* 411.

After Evidence given, the King cannot draw a Juror, but before he may; but after Evidence on his Prayer, the Court may discharge the Jury. *Keb.* 2 Part 506. King.

If the Defendant do not appear at the Trial when he is called, he loseth his challenge to the Jurors, although he doth afterwards appear. Challenge lost.

'Tis a good Challenge to a Juror to say, he is returned by another Name in the Panel. A wrong Name.

A Juror appeared, and said he had no Freehold, and prayed that he might not serve, yet the Judge would not spare him, for he may have an Action against the Sheriff for returning him. *Roll.* 2 Part, *Reports* 483. No Freehold.

The Challenge *pro defectu Hundred.* must be written in Parchment, and the Counsel must arraign it in *French*, upon which the Defendant may take Issue or Demur. The Clerk or Associate in Court must call the Jury over, and ask if they have any Lands within the Hundred, or had at the Time of the Array of the Panel, and whether they dwell, or did dwell in the same. And upon Examination, if it appear clearly, that they have no Lands or Tenements, nor dwell in the Hundred; then the Clerk is to mark them by the Side of every of their Names thus, [*præter Hundred.*] but if he find there be too few Hundredors, he is to resort back to the *præter Hundred.* and swear them in order. So that you see the Trial whether Hundredors or not, is determined by the Court's Examination by

by the Poll ſeverally. But if the Counſel demur, and the other Side join in Demurrer, the Judge of Aſſizes may affirm the Challenge, and overrule the Demurrer, or allow the Demurrer good, and proceed to the Trial of the Cauſe; or if the Judge doubt, it may be determined in Bank; but this is great Delay. If the Challenge be adjudged Good, the Court awards, *Que le panel il ſoit caſſe*, i. e. that the Panel be quaſhed.

In Cities, Corporations, Boroughs and Towns, and Counties, this Challenge cannot be.

At Common Law there ought to have been four Hundredors returned and appear in all Actions, *pro meliori notitia cauſæ in controverſia*, for *vicini vicinorum facta melius ſcire præſumuntur*. But by the Statute 35 *H.* 8. *cap.* 6. ſix are to be returned and appear. But ſince, by the Statute 27 *Eliz. cap.* 6. if two Hundredors be returned and appear, it is ſufficient in all perſonal Actions: But in real Actions there muſt be ſix, or elſe *Remanet pro defectu Jur'*.

Hundredors.

Note; In an Information of Forgery to be tried at Bar, upon the Attorney General's Motion, that the Defandant might not challenge for want of Hundredors; (*a*) it was denied him. *Keb.* 3 Part 740.

The Court ſhall appoint two Triors in a Challenge to the Poll, and if they find two indifferent, the firſt Triors ſhall be diſcharged; and the two that are found indifferent, being ſworn to try the Iſſue, ſhall alſo be ſworn to try the reſt of their Fellows. 1 *Inſt.* 158.

At Common Law there uſed to be returned twenty-four upon the *Venire*, and afterwards a *Habeas Corpora* with a *Decem Tales*; and if a full Jury did not appear or were challenged, then

(*a*) Challenging for want of Hundredors, or contrary to the Special Jury Rule, a Contempt. *Str.* 593.

a *Di-*

a *Distringas* with an *Octo Tales*, and so to the *Duo Tales*, if there were not a full Jury. And this was the Course until the Statute 35 *H.* 8. which gives the *Tales de Circumstantibus* at the Assizes, *&c.* and by the Statute 5 *Phil. & Mar. cap.* 7. where the King, Queen or Informer, *&c.* are Parties.

Tales de Circumstantibus may be in the Case of Aliens.

A Challenge may be taken to those of the *Tales de Circumstantibus.*

The King, or any one authorized for him, may release his Challenge. Where the Party may challenge, the King may challenge.

'Tis no Challenge to say, the Juror is the King's Tenant, or that he is favourable to the King; but it is good to say, the Sheriff or Juror bears Grudge or Malice to the Defendant where the King is Party. If the Juror hath any Freehold 'tis sufficient, although not to 40*s.* a Year: For the Statute which injoins that, speaks only betwixt Party and Party.

The first who challenges, be he Plaintiff or Defendant, shall have the Preference and Advantage of his Challenge. If a Juror be once challenged and withdrawn upon the Principal, he cannot serve upon the *Tales*; if he doth, 'tis Error, and Judgment may be stayed; and so if he be challenged, and a Jury remain *pro defectu Juratorum*, if he be sworn upon a new *Distringas*, 'tis Error, not helped by any Statute of *Jeofails*, and a Mis-trial, and a *Venire facias de novo* may be awarded. *Cro. Eliz.* f. 429. *Whitby*'s Case.

Esliſors may be sworn in some Cases to return and impanel all Juries, as should upon any *Venire facias*, *Habeas Corpora*, or *Distringas Jur.* come to their Hands, impartially, indifferently, and

and without Favour or Affection, nor at the Denomination of any Perſon.

In High Treaſon the Priſoner may peremptorily challenge to the Number of thirty-five, which is under the Number of three Juries; but in Petit Treaſon, Murder or Felony, the Number is reduced to twenty. The Priſoner may challenge any that are Witneſſes againſt him.

Where the King is Party, the Defendant muſt ſhew the Cauſe of his Challenge inſtantly.

After a Challenge for Cauſe, the Priſoner may challenge the ſame Perſon peremptorily.

Grand Jury.

One of the Petty Jury was challenged, becauſe he had been of the Grand Jury, and found the Bill. *Siderfin* 244. 'Tis a good Challenge.

Proſecutor entertained by a Juror, Cauſe of Challenge.

In an Information of Forgery, the Defendant challenged one of the Jury, for that the Proſecutor had been lately entertained at his Houſe: This was admitted to the Favour, though againſt the King. And then the Counſel for the King challenged another, and were preſſed to alledge the Cauſe, for 33 *Ed.* 1. takes away the general Challenge; but the Court (ſave *Wylde*, who ſeemed to be of another Opinion) ordered the Panel to be firſt gone through, and if there were enough, the King is not to ſhew any Cauſe. 1 *Vent.* 309. *T. Raym.* 473, 4.

Challenge by the King without ſhewing Cauſe.

Jurors found others guilty in the ſame Indictment: No Cauſe of Challenge.

The Jurors were challenged by the Priſoners, becauſe they had already given a Verdict, and found others guilty, who were indicted in the ſame Indictment: But held to be no Cauſe of Chellenge. *Kelynge* 9.

One challenged thirty ſix, and adjudged to be hanged.

One was arraigned of Felony, who challenged thirty-ſix peremptorily; and adjudged to be hanged, and not preſſed to Death. *Kelynge* 36.

Upon

Upon a Trial at Bar, *Trin.* 1 *W. & M.* the Queſtion was, Whether the Fair called *Wayhill* Fair, ſhould be kept at *Wayhill*, or at *Anderry?* And one of the Jury was challenged, becauſe he lived at *Wayhill:* This being a Challenge to the Favour, two of the Jurors were ſworn to be Triors, and their Oath was, *You ſhall well and truly try whether* A. *(the Juryman challenged) ſtand indifferent between the Parties to this Iſſue.* Salkeld 144. Triors of a Challenge to the Favour, the Oath.

Cook being indicted for High Treaſon, and the Jury called, he offered to ask the Jurors, in order to challenge them, if they had not ſaid he was guilty, or would be hanged? *Et per Cur'*, this is a good Cauſe of Challenge, but then the Priſoner muſt prove it by Witneſſes, and not out of the Mouth of the Juryman: A Juryman may be asked upon a *Voir (a) dire*, *(b)* whether he hath any Intereſt in the Cauſe, or whether he hath a Freehold, *&c.* For theſe do not make him criminal; but you ſhall not aſk a Witneſs, or a Juryman, Whether he hath been whipped for Larceny, or convict of Felony? Or whether he was ever committed to *Bridewell*, *&c.* becauſe that would make a Man diſcover that of himſelf which tends to make him infamous; How a Juryman ſhall be examined on a *Voire dire.*

(a) Voire, a *French* Word ſignifying truly.

(b) Voire dire, (Fr. *Veritatem dicere)* is when it is prayed upon a Trial at Law, that a Witneſs may be ſworn upon a *Voire dire*; which is, that he ſhall on his Oath ſpeak the *Truth*, whether he ſhall gain or loſe by the Matter in Controverſy; and if it appears that he is unconcerned, his Teſtimony is allowed, otherwiſe not. On a *Voire dire*, a Witneſs may be examined by the Court, if he be not a Party intereſted in the Cauſe, as well as the Perſon for whom he is Witneſs; and this has been often done, where a buſy Evidence, not otherwiſe to be excepted againſt, is ſuſpected of Partiality.

infamous; and in this Case the Answer might charge him with a Misdemeanor. *Et per Powel* Justice: In a Civil Cause, you may perhaps ask a Man if he has not given his Opinion beforehand upon the Right? For he might have done that as Arbitrator between the Parties. *Salkeld* 153.

It was held, that a Challenge to the Array is no Part of the Record, and ought to be determined whether good or bad by the Judge who should have tried the Cause, if the Challenge had not been taken; and has been so held in *B. C.* It was also said, That if a Demurrer be to a Challenge at the Assises, the Judge of Assise may determine it there, or adjourn it to be heard another Time. *Style* 464.

Precedents, containing the Forms of Challenges to the Array, *&c.* And the Proceedings thereupon. Pleas *Puis le Darrein Continuance*; Bills of Exception, *&c.*

A Challenge to the Array, because the Sheriff is Cousin to one of the Defendants.

AND now here at this Day came, as well the said *Henry Vernon*, the now Demandant, as the said *John Manners*, *&c.* by their Attornies aforesaid; and the Jury thereupon impanelled being called likewise came: And thereupon the said *Henry Vernon* challenges the Array

Array of the Panel aforesaid; because he saith, that that Panel was arrayed by one Sir *John Zouch*, Knight, now, and at the Time of making the said Array, Sheriff of the said County of *Derby*, which said Sheriff is the Cousin of the said *John Manners*; to wit, the Son of *George Zouch*, Esq; the Son of Sir *John Zouch*, Knight, the Son of *John Zouch*, Esq; the Son of *John Zouch*, Esq; the Son of *William* Lord *Zouch*, the Son of *Allen* Lord *Zouch*, the Son of *William* Lord *Zouch*, the Son of *Elizabeth* the Daughter of *William* Lord *Roos*, the Father of *Thomas* Lord *Roos*, the Father of *Thomas* Lord *Roos*, the Father of *Eleanor* the Mother of Sir *George Manners*, Knight, the Father of *Thomas* Earl of *Rutland*, the Father of the said *John Manners*. And this the said *Henry* is ready to verify. Wherefore he prays Judgment, and that the said Panel may be quashed. *Coke*'s Entries 340. *c.*

A Suggestion on the Roll by the Plaintiff, that the Sheriff is Tenant to the Plaintiff.

And thereupon the said *John* Lord *St. John* says, That *John Dyve*, Esq; is now Sheriff of the said County; and that the said *John Dyve* holds twelve Acres of Meadow, with the Appurtenances in *Budenham* in the County aforesaid, of the said *John* Lord *St. John*, at will, by the Rent of forty Shillings, to be paid to the said *John* Lord *St. John* yearly; and for that Cause, he prays a Writ of our Sovereign Lord the King, to cause to come twelve, *&c.* to try the said Issue above joined, to be directed to the *Coroners* of our said Lord the King, of the

the ſaid County. Whereupon the ſaid *Thomas* (the Defendant) ſays, That the ſaid *John Dyve* doth not hold the ſaid twelve Acres of Meadow, with the Appurtenances, or any Part thereof, of the ſaid *John* Lord *St. John*, at will, as the ſaid *John* Lord *St. John* hath above alledged. Therefore, notwithſtanding the aforeſaid Challenge of the ſaid *John* Lord *St. John* to the ſaid Sheriff, it is commanded the ſaid Sheriff, that, *&c.* *Coke*'s Entries 397. *a.*

A Precedent of a Challenge for Default of Hundredors.

And thereupon the ſaid *A. B.* by *C. D.* his Attorney, comes and challenges the Array of the Panel aforeſaid; becauſe he ſaith, That the Vill of *Dale* in the County aforeſaid, in which the ſaid Cauſe of Action ariſes, and is laid in the ſaid Declaration to ariſe, at the Time of making the ſaid Array, was, and now is within the Hundred of *Downs*, in the County aforeſaid; and that the preſent Sheriff of the County aforeſaid, hath not returned or impanelled any Hundredors of the Hundred of *Downs* aforeſaid, to try the Iſſue now joined between the ſaid Parties; neither have the Jury now impanelled and returned, or any of them, nor had they, or any of them at the Time of making the ſaid Array, or at any Time ſince, any Lands or Tenements within the ſaid Hundred of *Downs*; neither do the ſaid Jury, or any of them now, nor did they, or any of them at the Time of making the ſaid Array, dwell or inhabit within the ſaid Hundred. And this the ſaid *A. B.* is ready to verify.

rify. Wherefore he prays Judgment, and that the ſaid Panel may be quaſhed.

This muſt be under Council's Hand, and the Proceedings herein you may read before; if they demur, thus,

Moratur in Lege
W. T.
Joinder in Demurrer
G. D.

A Challenge by the Defendant, becauſe the Sheriff is Couſin to the Leſſor of the Plaintiff.

And thereupon the ſaid Defendant, by *A. B.* his Attorney, comes and *challenges* the Array of the Panel aforeſaid; becauſe he ſaith, That that Panel was made and arrayed by *C. D.* Eſq; now, and at the Time of making the Array of the ſaid Panel, Sheriff of the County aforeſaid; which ſaid Sheriff is the *Couſin* of *E. F.* Gentleman, the Leſſor of the Plaintiff named in the ſaid Declaration, To wit, The Son of *G. H.* the Son of *K. L.* the Daughter of *M. N.* the Son of *O. P.* the Father of *Q. R.* the Mother of the ſaid *E. F.* the Leſſor of the ſaid Plaintiff named in the ſaid Declaration. And this the ſaid Defendant is ready to verify. Wherefore he prays Judgment, and that the ſaid Panel may be quaſhed, *&c.*

If the Plaintiff deny the Kindred and Affinity, then thus,

Nient Couſin par le manner
W. T.
eſt Couſin
G. D.

Then are two or more Triors ſworn, but ſeldom more than two, and (after they have heard the Proofs and Evidence given to make good the Defendant's Plea) they give their Verdict accordingly.

Note; *The Plaintiff may, if he pleaſe, demur upon the Challenge.*

A Challenge to the Array by a Peer, becauſe no Knight was returned upon the Jury; and a Demurrer to the ſame, and Joinder in Demurrer.

And thereupon the ſaid Earl *challenges* the Array of the Panel of the ſaid Aſſize; becauſe he ſaith, That he now is, and at the Time of ſuing out the ſaid Writ of Aſſiſe, and long before, was one of the Nobles and Peers of this Realm, having a Seat and a Vote in every Parliament of the ſaid Realm; and that the Array of the Panel of the ſaid Aſſiſe was arrayed by *T. O.* and *W. H.* late Sheriff of the ſaid County of *Middleſex*, no *Knight* being named or returned in the ſaid Panel of that Array, as there ought to have been according to the Law of this Realm. And this he is ready to verify. Wherefore he prays Judgment, and that the Panel may be quaſhed.

And the ſaid *J. N.* ſays, That the ſaid Challenge of the ſaid Earl above made by the ſaid Earl to the Array of the Panel of the ſaid Aſſiſe, is not ſufficient in Law to quaſh the Array of the ſaid Panel; and that by the Law of the Land he is not bound to anſwer to the ſaid Challenge in Manner and Form aforeſaid alledged. And this he is ready to verify. Wherefore he prays Judgment,

Judgment, and that the Array of that Panel may be affirmed.

And the ſaid Earl, for as much as he hath alledged a ſufficient Challenge to quaſh the Array of the ſaid Panel, which he is ready to verify; which ſaid Challenge the ſaid *J. N.* hath not denied, neither doth he any ways anſwer thereto, prays Judgment, and that the Array of the Panel of that Aſſiſe may be quaſhed. *Plowd.* 117. and Judgment was given to quaſh the Panel.

A Challenge to the Array, becauſe returned at the Denomination of the Plaintiff.

And thereupon the ſaid *A. B.* by *C. D.* his Attorney, comes and *challenges* the Array of the ſaid Panel; becauſe he ſaith, That that Panel was made and arrayed by *E. F.* the preſent Sheriff of the ſaid County and his Officers, at the *Denomination* and Inſtance of the ſaid Plaintiff, in Favour of the ſaid Plaintiff. And this he is ready to verify. Wherefore he prays Judgment, and that that Panel may be quaſhed, *&c.*

To which the Plaintiff may plead, that the Array of the Panel was well and equally made and arrayed by the ſaid Sheriff and his Officers, according to the Duty of his Office.

Or the Plaintiff, if he will, may confeſs it; but if he plead, then the Judges immediately aſſign Triors to try the Array, which ſeldom exceed two, who being choſe and ſworn, the Aſſociate or Clerk in Court doth declare and rehearſe unto them

the Matter and Cauſe of the Challenge, and after he hath ſo done, concludes to them thus. And ſo your Charge is to inquire whether it be an even and impartial Array, or a favourable one: *And if they affirm it, then the Clerk enters underneath the Challenge,*

Affirmatur.

But if the Triors find it favourable, then thus;

Calumpnia vera.

A Challenge becauſe the Cauſe of Action aroſe within an Hundred, of which the Plaintiff is Lord, and praying a Writ to the next Hundred.

And thereupon the ſaid *A.* ſaith, That the ſaid Vill of *Dale*, in which the ſaid Treſpaſs was done, is within the Hundred of *B.* and that he is Lord of the ſaid Hundred; and that all the Freeholders within the ſaid Hundred are within the *Diſtreſs* of the ſaid *A.* and for that Reaſon he prays a Writ of our ſaid Lord the King to cauſe to come, *&c.* to try the ſaid Iſſue from the next *Neighbourhood* in the ſaid County, out of the *Hundred* next adjoining to the ſaid Vill of *Dale*, to be directed to the Sheriff of the ſaid County; and becauſe the Defendant doth not deny this, it is granted to him; therefore it is commanded, *&c.*

A Chal-

A Challenge becauſe the Sheriff and two of the Coroners are Tenants of the Plaintiff, and a Venire *prayed to the other Coroners.*

And thereupon the ſaid *A. B.* ſaith, That as well *C. D.* Knight, Sheriff of the ſaid County, as *E. F.* and *G. H.* two of the Coroners of the ſaid County, are Tenants of the ſaid Plaintiff, and within his *Diſtreſs*; and for that Reaſon he prays a Writ of our ſaid Lord the King to cauſe to come, *&c.* to be directed to *E. A.* and *R. P.* the reſt of the Coroners of our ſaid Lord the King in the ſaid County; and becauſe the ſaid Defendant doth not deny the ſame, it is granted to him, *&c.*

A Challenge, becauſe after the laſt Continuance the Couſin of the Plaintiff is made Sheriff.

At which Day here came the ſaid Parties, *&c.* the Sheriff did not return the Writ. And thereupon the ſaid Plaintiff ſaith, that *after the laſt Continuance* of the ſaid Plea, to wit, after the *Octaves* of St. *Martin* laſt paſt, from which Day the ſaid Plaint was continued here until this Day, to wit, *ſuch a Day* laſt paſt, the preſent King by his Letters Patent did grant the Cuſtody of the ſaid County to Sir *A. B.* Knight; by Virtue of which Letters Patent the ſaid *A. B.* is now Sheriff of the ſaid County; which ſaid *A. B.* is the Couſin of the ſaid Plaintiff, to wit, the Son, *&c.* And for that Reaſon he prays a Writ, *&c.* to be directed to the Coroners of our ſaid Lord the King, of the ſaid County, *&c.*

A Challenge becauſe the Sheriff is of Council with the Plaintiff, and hath a Salary.

And thereupon the ſaid Plaintiff ſaith, That *A. B.* is now Sheriff of the ſaid County; which ſaid *A. B.* is one of the Council of the ſaid Plaintiff, and hath of him the yearly Rent or Fee of 20*l.* and for that Cauſe he prays a Writ, *&c.* to be directed to the Coroners, *&c.* And becauſe the ſaid Defendant denies this, therefore, notwithſtanding the ſaid Allegation of the ſaid Plaintiff, the Sheriff is commanded, *&c.*

A Challenge, where the Plaintiff is Sheriff, and one of the Coroners his Tenant.

And thereupon the ſaid Plaintiff ſaith, That he is now Sheriff of the ſaid County; and that there are in the ſaid County two Coroners, to wit, *R. H.* and *R. D.* and that *R. H.* one of the ſaid Coroners, holds of him one Meſſuage, *&c.* at the yearly Rent of, *&c.* And for theſe Reaſons he prays a Writ, *&c.* to be directed to the ſaid *R. D.* the other Coroner of the ſaid County, *&c.*

A Challenge, becauſe the Plaintiff is one of the Sheriffs of London, *and a* Ven. fac. *awarded to the other Sheriff alone.*

And thereupon the ſaid Plaintiff ſaith, That he and one Sir *John Blunt*, Knight, are Sheriffs of *London*; and becauſe he is one of the Sheriffs of *London*, he prays that a Writ, *&c.* may be directed to the ſaid Sir *John Blunt*, the other Sheriff,

Sheriff, only, *&c.* And the ſaid Defendant was asked if he could ſay any Thing why the ſaid Proceſs ſhould not be directed to the ſaid Sir *J. B.* the other Sheriff alone; who ſaid that he could not. Therefore it was commanded the ſaid Sir *J. B.* that he ſhould cauſe to come, *&c.* ſo that the ſaid Plaintiff ſhould in no wiſe intermeddle therewith.

A Challenge becauſe the Panel was made by the Under-Sheriff, at the Denomination of the Plaintiff.

And thereupon the ſaid Defendant challenges the Array of the Panel of the ſaid Jury, becauſe he ſaith, That that Panel was made and arrayed by *T. W.* Under-Sheriff of the ſaid County, at the Denomination of the ſaid Plaintiff, in Favour of the ſaid Plaintiff. And this he is ready to verify, *&c.*

Entry of a Challenge after Iſſue joined, where the Sheriff is removed, *&c.*

Mich. 23 *&* 24 *Eliz. Rot.* 109. Therefore came thereupon the Jury before our Lady the Queen at *Weſtminſter*, the Day, *&c.* who neither, *&c.* to recognize, *&c.* becauſe as well, *&c.* The ſame Day is given to the ſaid Parties there, *&c.* At which Day, before the ſaid Queen at *Weſtminſter*, came the ſaid Parties by their ſaid Attornies, and the Sheriff ſent not the Writ; and upon this, the ſame Plaintiff ſaith, That *after the laſt Continuance* of the ſaid Plea, that is to ſay, after the *Saturday* next after, *&c.* now laſt paſt; from which Day the ſaid Plaintiff was continued here until this Day, that is to ſay, the Day, *&c. R. P.* Eſq; late Sheriff of the ſaid County of *E.* from the ſame Office

Between *Barkley* and *Jefferſon*,

of Sheriff of that County was duly *amoved*; and the ſaid Queen now by her Letters Patent, hath committed unto one *T. P.* Knight, the Cuſtody of the ſaid County of *E.* by Pretence of which ſaid Letters Patent the ſaid *T. P.* now remaineth Sheriff of that County, which ſaid *T. P.* of *A.* at *A.* aforeſaid took his Wife *Anne*, of the Blood of *M.* now the Wife of him the Plaintiff; that is to ſay, the Daughter of *R. D.* the Son of *W. D.* Knight, Father of *Anne*, Mother of the ſaid *M.* now Wife of him the Plaintiff; which ſaid *T. P.* Knight, and *A.* had Iſſue between them *A. P.* yet alive, and in full Life remaining, at *A.* aforeſaid; and this he is ready to prove, *&c.* And for that Cauſe he prayeth a Writ of our Lady the now Queen, of *Venire facias*, to try the ſaid Iſſue in Form aforeſaid joined, to be directed to the Coroners of the ſaid County; and becauſe the ſaid Defendant doth gainſay, and doth not grant that to be true; therefore, notwithſtanding the ſame Challenge, a Command is to the Sheriff, that he make to come twelve, *&c.* of the *Viſne* of *B.* by whom, *&c.*

Challenge gainſaid.

Challenge to the Array, becauſe the Coroners made the Panel at the Denomination of the Plaintiff.

Eaſter Term 38 *H.* 8. *Rot.* 558. And hereupon the Defendant doth challenge the Array of the Panel of the ſaid Jury, becauſe he ſaith, That that Panel was made and arrayed by *A.* and *C. Coroners* of the ſaid County, at the *Denomination*, and in Favour of the ſaid Plaintiff; and this he is ready to verify, and requeſteth that the ſame Panel may be quaſhed. And the ſaid Plaintiff ſaith, That the ſaid Panel by the ſaid Coroners was well and equally made; and not at the Denomination, or in Favour, nor in Promotion of the ſaid Plaintiff; whereupon the ſaid Juſtices, by the Conſent of the ſaid Parties, did chuſe and aſſign *D.* and *E.* two of the ſaid Jury now

now appearing, to try the ſaid Challenge; which ſaid Triors being elected and tried, ſay upon their Oaths, that the ſaid Panel was well and faithfully made and arrayed by the ſaid Coroners, and not at the Denomination, neither in Favour, nor in Promotion of the ſaid Plaintiff; whereupon the Jurors of the ſaid Jury being called, tried and ſworn, ſay, *&c.*

A Precedent of a Plea after the laſt Continuance.

Of a Releaſe.

And now at this Day, *&c.* comes ſuch a one Defendant, by *J. C.* his Counſel, and ſaith, This Action the Plaintiff againſt the Defendant ought not to maintain; for that after the *Quinden'* of the Holy *Trinity* laſt paſt, from which Day, until ſuch a Day in *Michaelmas* Term next, unleſs the Juſtices of Aſſizes come before ſuch a Day, *&c.* the Action aforeſaid is continued, *&c.* the Plaintiff by his Deed dated, *&c.* did releaſe, *&c.* and ſhew, *&c.* the Matter what it is, whether in Abatement, in Bar dilatory, or peremptory, as the Caſe is, *&c.* and this he is ready to aver. *To this Plea muſt be annexed an Affidavit of the due Execution of the Deed, Releaſe*, &c.

Note; *Brook* in his *Abridgment*, Tit. *Continuance*, 61 and 83, ſays, That after the Inqueſt is awarded to inquire of Damages, the Defendant cannot plead a Plea *Puis le darrein Continuance*, becauſe he hath no Day in Court to plead.

The Day of *Niſi prius* and Day in Bank are all one; ſo that a Releaſe made betwixt theſe Days cannot be pleaded in Bank; but it ſeems that a Releaſe made between the Day of the *Venire facias* returned, and the Writ of *Niſi prius* awarded,

awarded, and the Day of the *Nisi prius*, may be pleaded at the Day of the *Nisi prius*, but not after the Verdict. 21 *H.* 6. f. 10. *Bro.* Tit. *Juror*, &c. 31. Tit. *Continuance*, 76, 42, 27, 13.

A Man shall have but *one Plea* after the last Continuance; for the Plaintiff shall not be delayed *ad infinitum.* 16 *H.* 7. 11. *Bro.* Tit. *Continuance*, 59, 41, 45, 46, 5, 21.

After the Inquest taken by Default, and before Judgment, the Defendant came and pleaded an Arbitrament made after the last Continuance; and by the Opinion of the Court, he had no Day in Court to plead this Plea; and it was said, that he could plead no Plea in such Case, but as *Amicus Curiæ*, and of Matter apparent, he shall be received; otherwise he must resort to his *Audita Querela.* 21 *H.* 7. 33. *Brook*, *ibid.* 38.

But if the Jury remain for Default of Jurors, the Defendant may plead a Release, *&c.* at the Day in Bank *Puis le darrein Continuance*, although he did not offer it at the *Nisi prius*; otherwise if the Jury had been taken at the *Nisi prius.* 22 *H.* 6. 1. *Brook*, *ibid.* 30.

If it be pleaded at the *Nisi prius*, the Court may record the Plea, and discharge the Inquest, and give Day to the Parties in Bank. *Ibid.* 34. 8.

In Debt after Issue joined, the Defendant at the *Nisi prius* pleaded Payment of Part after the latter Continuance in Abatement. And the Jury being discharged, and the Plea adjourned in Bank, for that no Place of Payment was pleaded, the Plaintiff had Judgment to recover his Debt, because after Issue joined, no *Respondeas ouster* can be awarded. *L.* 5 *E.* 4. 139. *Aleyn's Rep.* 69. in the Case of *Beaton* and *Forest.*

If

If after a Plea in Bar the Defendant pleads a Plea *Puis darrein Continuance*, that is a Waver of his Bar; and no Advantage ſhall be taken of any Thing in the Bar. 1 *Salk.* 178.

One may plead *Puis darrein Continuance*, that the Plaintiff brought a ſecond Action for the ſame Cauſe, and recovered; though he might have pleaded the former in Abatement of the ſecond Action. *Per Holt* C. J. *Comberb.* 357.

To an Action brought by an Adminiſtrator *de bonis non cum teſtamento annexo*, during the Minority of *R. W.* it is a good Plea for the Defendant, *Puis darrein Continuance*, that *R. W. puis darrein Continuance*, had attained the Age of twenty-one Years; for by that the Adminiſtrator's Power is determined, and of Conſequence the Action alſo. 1 *Lutw.* 342.

A [Releaſe pleaded *puis darrein Continuance* muſt be pleaded in Bar, and pray Judgment if the Plaintiff ought further to have or maintain his ſaid Action; being this is a Collateral Matter that happened ſince the Action was brought, and thereby the Defendant admits that the Action was well brought at firſt; but that by reaſon of this new Matter the Plaintiff ought not to proceed any further. 2 *Lutw.* 1143.

Now, although, when Difficulty ariſes in the Evidence, the Matter is moſt commonly (of late) found ſpecially, and Demurrers on the Evidence are ſeldom uſed; yet inaſmuch as it is ſometimes done, and that our Practiſer may be prepared with an Authentick Precedent for that Purpoſe, I ſhall tranſcribe one out of *Coke's Entries*, *f.* 134. *viz.*

Demurrer on the Evidence.

Afterwards, at the Day and Place within named, before Sir *James Dyer*, Knight, Chief Juſtice,

Juſtice, *&c.* and *N. B.* Juſtices of our ſaid Lady the Queen, aſſigned according to the Form of the Statute, *&c.* to hold the Aſſizes in the County of *Northampton*, *&c.* came, as well the within named *J. A.* as the within written *H. C.* by their ſaid Attornies. And the Jurors of the Jury within mentioned being called likewiſe came; who were elected, tried and ſworn to ſpeak the Truth concerning the Premiſſes. Whereupon the ſaid *H.* by *J. B.* his Council, in order to maintain the Iſſue within joined, gave in Evidence to the ſaid Jury before the ſaid Juſtices, That (*here inſert the Evidence* verbatim.)And ſo the ſaid *H.* ſaith that, *&c.* as he hath within in his Plea alledged: Wherefore he prays Judgment; and that the ſaid Jurors may give their Verdict of and concerning the Matters within contained for the ſaid *H.*

And the ſaid *J. A.* by *C. Y.* his Council ſaith, That the Matter aforeſaid by the ſaid *H.* above given in Evidence to the ſaid Jury, is not ſufficient to prove the Iſſue above joined on the Part of the ſaid *H.* And that he to the ſaid Matter ſo given in Evidence in the Form aforeſaid, is not bound by the Law of the Land to anſwer: And this he is ready to verify. Wherefore for want of ſufficient Matter ſhewn to the ſaid Jury in that Behalf, the ſaid *J. A.* prays Judgment, and that the Jurors aforeſaid may be diſcharged from giving their Verdict on the ſaid Iſſue, and that his Debt within mentioned, together with his Damages by reaſon of the detaining that Debt, may be adjudged to him.

And the ſaid *H.* ſince he hath above given in Evidence to the ſaid Jury, ſufficient Matter in Law to maintain the Iſſue within mentioned on the

the Part of the ſaid *H.* which he is ready to verify, which ſaid Matter the ſaid *J.* hath not denied, nor any wiſe anſwered thereto, prays Judgment; and that the ſaid *J. A.* may be barred from having his ſaid Action againſt him, and that the ſaid Jurors may be diſcharged from giving their Verdict upon the ſaid Iſſue: *And at the Day in Bank Judgment was given for the Plaintiff, that the Evidence was ſufficient.*

A Precedent of a Demurrer upon the Evidence.

And now at this Day the ſaid Plaintiff and Defendant by their Attornies did appear, and the Jury likewiſe did appear and were ſworn, *&c.* upon which Sir *T. W.* Serjeant at Law, of Council with the Plaintiff, gave in Evidence ſo and ſo, [*here repeat it truly*] and did require the Jurors to find for the Plaintiff; upon which *J. C.* of Counſel with the Defendant ſaith, That the Evidence and Allegations aforeſaid alledged, were not ſufficient in Law to maintain the Iſſue joined for the Plaintiff, to which the Defendant need not, nor by the Laws of the Land is not holden to give any Anſwer; wherefore, for Default of ſufficient Evidence in this Behalf, the Defendant demands Judgment, that the Jurors aforeſaid of giving their Verdict be diſcharged, *&c.* and that the Plaintiff be barred from having a Verdict, *&c.* Then the Plaintiff joins and ſays, That he had given ſufficient Matter in Evidence, to which the Defendant hath given no Anſwer, *&c.* and demands Judgment, and that the Jury be diſcharged, and that the Defendant be convicted; then the Jury may give Damages, if Judgment ſhall happen to be for the Plaintiff, *&c.* Clayton's Rep. 154.

A Bill

A Bill of Exception.

—— To wit. Be it remembered, That the Day of in the Year of our Lord before *T. B.* and *W.* Juſtices of our ſaid Lord the King, for taking Aſſizes in the ſaid County aſſigned, in a Plea of Treſpaſs and Ejectment, which *J. S.* in the Court of our ſaid Lord the King before himſelf, by Bill, doth proſecute againſt *E. B.* ſuppoſing by the ſaid Bill, that the aforeſaid *T. B.* &c. [*And recite the Subſtance of the Declaration, or what it is*, &c. *and the Iſſue, and then what the Evidence to prove the Defendant guilty was, which here was a Surrender of a Copyhold out of Court*, &c.] and that he deſired the Jury aforeſaid to give their Verdict for the ſaid *T. B.* of and upon the Premiſſes, and that he likewiſe deſired the Judges aforeſaid, that they would inform the Jury aforeſaid, that the Surrender aforeſaid out of Court made, was good and effectual in Law; and the aforeſaid Juſtices the aforeſaid Surrender of the Land aforeſaid, with the Appurtenances, made out of Court of the Manor aforeſaid, in Form aforeſaid, did affirm to the ſaid Jurors was not good in Law, by which the ſaid *Thomas*, for that the aforeſaid Matters to the ſaid Jurors in Evidence ſhewed, do not appear, &c. did requeſt of the ſaid Juſtices, according to the Form of the Statute in ſuch Caſe provided, this preſent Bill, which doth contain in it the Matter aforeſaid, above by him to the Jurors aforeſaid ſhewed; by which the ſaid Juſtices, at the Requeſt of him the ſaid *Thomas*, this Bill have ſealed at *D.* aforeſaid.

Vide a Bill of Exceptions in the *King's Bench*, upon a Trial at the Aſſizes in *Sam. Vernon*'s Caſe,

in

in *Brownlow's Entries Latine Rediviv. f.* 129. where the Declaration, Plea, and Continuances are set forth, and then the Exception. A very useful Precedent.

Hillary *Term in the 33d and 34th Year of the Reign of our Lord* Charles *the Second, the present King of* England, *&c.*

Kent, to wit, *Samuel Vernon*, &c. [*here recite all the Pleadings and Continuances of the Record.*] Which said several Issues in Manner aforesaid respectively joined between the said Parties, afterwards, to wit, at the Assizes held at the Castle of *Canterbury* in the County aforesaid, before *W. Montague*, Chief Baron of the *Exchequer* of our said Lord the King, and Sir *H. Windham*, Knight, one of the Justices of our said Lord the King, of the Court of *Common Pleas*, the Justices of our said Lord the King assigned to hold the Assizes for the said County, according to the Form of the Statute, *&c.* on *Tuesday* the 14th Day of *March* in the 34th Year of the Reign of our said Lord the present King, came to be tried. At which Day before the said Justices, come as well the said *S. V.* in his proper Person, as the said *J. T.* by his said Attorney; and the Jurors of the Jury impanelled being called likewise came, and were sworn to try the said several Issues in Manner aforesaid respectively joined. And upon that Trial in Manner aforesaid had, to maintain the said Issues, the said *S. U.* gave in Evidence to the Jury so impanelled and sworn, That, *&c.* [*here recite the Evidence*]. And thereupon the Counsel on the Part of the said *J. F.* interposed and insisted, That the said Matter,

so

ſo as aforeſaid given in Evidence to the Jurors aforeſaid, was not ſufficient in Law to maintain the ſaid Iſſues on the Part of the ſaid *S. U.* and thereupon prayed of the ſaid Judges, That the ſaid Matter might be found ſpecially. Notwithſtanding which the ſaid Judges declared their Opinion, That the ſaid Matter, ſo as aforeſaid given in Evidence to the Jurors aforeſaid, was ſufficient in Law to maintain the ſaid Iſſues on the Part of the ſaid *S. U.* if the Jurors ſhould believe it; and find that, *&c.* And thereupon the ſaid Juſtices, by their Direction to the Jury, according to their Opinion aforeſaid, left the Conſideration thereof to the ſaid Jurors: Whereupon the Counſel of the ſaid *J. F.* conceived, that by the Law of the Land the Matters aforeſaid, ſo as aforeſaid, on the Part of the ſaid *S. U.* given in Evidence to the ſaid Jurors, (although the Jurors ſhould believe and find, That, *&c.*) were not ſufficient in Law to maintain thoſe Iſſues on the Part of the ſaid *S. U.* Therefore they made their Exception to the ſaid Opinion of the ſaid Juſtices, and prayed that the ſaid Juſtices would ſet their Hands and Seals to this Bill, according to the Form of the Statute in the like Caſe lately made and provided: And thereupon the ſaid *H. Windham* ſet his Hand and Seal thereto, according to the Form of the ſaid Statute. At the Caſtle of *Canterbury*, 14th *March* in the 35th Year of the ſaid King.

1. *Weſt.* 2. 31. or 13 *E.* 1. 31. When the Juſtices will not allow a Bill of Exception upon Prayer, if the Party impleaded tender the ſame unto them in Writing, and requires there Seals thereunto, they or one of them ſhall do it.

2. If

2. If the Exception ſealed be not put into the Roll, upon Complaint thereof to the King, the Juſtice ſhall be ſent for, and if he cannot deny the Seal, the Court ſhall proceed to Judgment according to the Exception.

This Bill of Exception is given by the Statute of *Weſtm.* 2. *cap.* 31. before which Statute a Man might have had a Writ of Error; for Error in Law, either *in redditione Judicii*, *in redditione Executionis*, or *in Proceſſu*, *&c.* which Error in Law muſt be apparent in the Record; or for Error in *Fait*, by alledging Matter out of the Record, as the Death of either Party, *&c.* before Judgment. But the Miſchief was, if either Party did offer any Exception, praying the Juſtices to allow it, and the Juſtices over-ruled it, ſo as it was never entred of Record, this the Party could not aſſign for Error, becauſe it neither appeared within the Record, nor was any Error in *Fait*, but in Law; and ſo the Party grieved was without Remedy until this Statute was made. 2 Inſt. 426.

This Act extendeth to all Courts, to all Actions, and to both Parties, and to thoſe who come in their Places, as to the Vouchee, *&c.* who comes *in loco tenentis.*

It extendeth not only to all Pleas dilatory and peremptory, *&c.* to Prayers to be received, *Oyer* of any Record or Deed, and the like; but alſo to all Challenges of Jurors, and any Material Evidence given to any Jury, which by the Court is over-ruled. 2 *Inſt. f.* 427.

All the Juſtices ought to ſeal the Bill of Exceptions, yet if one doth it, it is ſufficient; if all refuſe, it is a Contempt in them all. And the Party grieved may have a Writ grounded upon this Statute, commanding them to put

their Seals *juxta formam Statuti, & hoc ſub periculo quod incumbit nullatenus omittatis. Ibid.*

The Party muſt pray the Juſtices to put their Seals before Judgment; but if they deny it they may be commanded, and may do it after Judgment. *Ibid.*

If the Party be dead, his Heirs or Executors, *&c.* according to the Caſe, may have a Writ of Error upon this Bill of Exceptions. And no Diminution can be alledged, for the Parties are confined to the Matter in the Bill. *Ibid.*

If the Juſtice die before he acknowledgeth the Seal according to the Act, a *Scire facias* ſhall go to his Executor or Adminiſtrator, for the Death of the Judge is the Act of God, which ſhall not prejudice the Party: As in the Caſe of a Certificate of the Marſhal of the King's Hoſt, that the Perſon outlawed was in the King's Service beyond Sea, in a Writ of Error a *Scire facias* ſhall go to the Marſhal's Executor or Adminiſtrator upon ſhewing the Certificate. 2 *Inſt.* 428.

If the Judge denieth his Seal, the Party may prove it by Witneſſes. *Ibid.*

Error of a Judgment at the Grand Seſſions in the County of *Pembroke*, in an Aſſize of *darrein Preſentment*, by *Henry Cort*, againſt the Biſhop of St. *David's*, *Dorothy Owen* and others, for the Church of *Stackpool*.

The fourth Error aſſigned was, becauſe the Iſſue being, whether *H. Cort* did laſt preſent one *R. D.* the laſt Incumbent, who was inſtituted and inducted upon this Preſentation; The Plaintiff offered in Evidence Letters of Inſtitution, which appeared to be, and ſo mentions that they were ſealed with the Seal of the Biſhop of *London*, becauſe the Biſhop of St. *David's* had not his Seal

Seal of Office there, and thoſe Letters were made out of the Dioceſe; and the Defendant had demurred thereupon, that thoſe Letters were inſufficient, and the Demurrer was denied; which *Jones* ſaid was an Error, becauſe they ought to have permitted the Demurrer, and ſhould have adjudged upon it. But it was held, That the not admitting of the Demurrer ought not to be aſſigned for Error; for when upon the Evidence, the Matter was over-ruled by the Juſtices of Aſſize, that was a proper Cauſe of a Bill of Exceptions, and the Remedy which the Statute appoints in that Caſe: And for the Matter of the Letters of Inſtitution, ſealed with another Seal, and made out of the Dioceſe, it was held they were good enough; for the Seal is not material, it being an Act made of the Inſtitution, and the Writing and Sealing is but a Teſtimonial thereof, which may be under any Seal, or in any Place. But of that Point they would adviſe. *Cro.* 1 Part 340.

The Party grieved may have a Writ of Error, and may aſſign Error upon that Bill ſealed, and alſo in the Record, or in one of them at his Pleaſure, *F. N. B.* f. 21. N. *Ex rigore juris*, it need not be allowed in Arreſt of Judgment. 27 *H.* 8. in *Tatum*'s Action upon the Caſe.

Sir *Henry Vane* being indicted of High Treaſon tendered a Bill of Exceptions, which the Court refuſed to accept: And held that a Bill of Exceptions did not lie in Criminal Caſes, but only in Actions between Party and Party. 1 *Lev.* 68. *Keyling* 15. 1 *Sid.* 84.

The Biſhop of *Coventry* and *Litchfield* was indicted for a Treſpaſs, and the Court allowed him a Bill of Exceptions. 1 *Leon.* 5.

Error of Judgment in *C. B.* in *Ireland*, in Ejectment. The Question was upon the Bill of Exceptions, for that the Justices there would not direct the Jury, that a Probate of a Will before the Archbishop of *Canterbury*, and also before the Bishop of *Fernes*, were sufficient *concluding* Evidence, but only affirmed that they were *good* Evidence, leaving it to the Jury, to which the other Party shewed in Evidence Letters of Administration under the Seal of the Primate of *Ireland*; whereupon the Jury found no such Will, and Judgment there given for the Plaintiff, and Error brought here by Defendant; and Judgment affirmed. *T. Raym.* 404, 405.

A Bill of Exceptions does not extend where Prisoners are indicted at the Suit of the King. *T. Raym.* 486.

The Justices of the Peace having removed a *Pauper* and his Family from the Parish of *Nanesbrough* to the Parish of *Preston on the Hill* in *Cheshire*, *Preston* appeals to the Sessions, who confirmed the Orders; but the Counsel for the Appellants, at the hearing of the Appeal, tendred a Bill of Exceptions, stating a special Fact; which was returned up under the Seals of two of the Justices, together with the Order into *B. R.* by Virtue of a *Certiorari*. And the Court of *King's Bench*, upon great Debate, held, that a Bill of Exceptions did not lie in this Case, by reason no Writ of Error lay; and for that Reason confirmed the Order of Sessions. The King *versus* Inhabitants of *Preston on the Hill* in *Cheshire*, *M.* 9 *G.* 2. and *P.* 9 *G.* 2. in *B. R.*

In an Information in the Nature of a *Quo warranto*, against *Higgins* and Others, Citizens of the City of *Worcester*, for using several Liberties and Franchises within the said City; the Court

Court of *King's Bench* upon a Trial at Bar allowed a Bill of Exceptions. *T. Raym.* 484, 486. 1 *Vent.* 366.

Note; This Bill is to prevent the Precipitancy of the Judges, and ought to be allowed in all Courts, and in all Places of Pleadings, and may be put in at any Time before the Jury have given their Verdict.

But this Bill is rarely uſed, there being *impar congreſſus* betwixt the Judge and the Council; and the Prudence of the Judges induces them to find ſpecial Verdicts in Caſes of Doubt and Difficulty.

After a Bill of Exceptions is ſigned, the Party who preferred the Bill may bring Error in Parliament.

CHAP. X.

Of what Things a Jury may inquire; when of Spiritual, when of Things done in another County, or in another Kingdom; when of Eſtoppels, and when not; when of a Man's Intent, &c.

THE next Words in the Writ, which have not yet been taken Notice of, are theſe, *per quos rei veritas melius ſciri poterit*; and this is the chief End of their meeting together: No Court can give a Right Judgment, unleſs the Truth of the Fact be certainly known; and to find out this Truth, no Way is like to this of Juries; for they do not only go upon their own

See more of this Matter, *cap.* 13.

Ex facto Jus oritur.

Knowledge, though they are Neighbours to the Place where the Queſtion is moved, and ſo are preſumed to have a better Knowledge of the Fact, than any others; for *vicinus*, *facta vicini*, *præſumitur ſcire*. But leſt this Preſumption ſhould fail, the Law allows other Evidence to be given to them, by which they may more certainly and confidently give their Verdict of the Iſſue, which is meant by this Word *Rei*.

And here it will not be amiſs to give you a brief Deſcription, *de quibus rebus*, what the Inqueſt may inquire of and find.

Of the Law. Wherefore, though it be true, that a Jury ſhall not be charged, or meddle with a Matter of Law; and if they do, and find it, their Verdict as to this ſhall be void; yet daily Experi-

1 Inſt. 228. ence (as well as *Littleton*, *Sect.* 368.) tells us, that they may take upon them the Knowledge of the Law, and give a general Verdict; though to find the ſpecial Matter is the ſafeſt Way for them; becauſe, if they miſtake the Law, they run into the Danger of an Attaint.

In the Caſe of *Manby* and *Scot*, adjudged *Trin.* 13 *Car.* 2. *B. R.* one Queſtion was, If the Verdict was well found, in an Action of the Caſe againſt the Huſband for Wares bought by the Wife; the Verdict finding, that the Wares were Neceſſaries, and according to her Degree, whereas (as was objected) they ought to have found the Degree of the Party, and the Value of the Wares, and left it to the Court to judge.

But it was anſwered and reſolved, that the Court, *i. e.* the Judge before whom it is tried, informs the Jury of the Matter of Law, and accordingly they find, and ſo it belongs not to this Court.

Broughton

Broughton, a Reader of the *Temple*, brought a Bill by *Quo minus* in the *Exchequer*, againſt *Prince*, for maintaining a Suit againſt the Statute, *&c. Prince* pleads, that he was admitted in the *Inner Temple*, and Student for many Years there, that he was *Conſiliarius in lege eruditus*, and took his Fee in that Cauſe. *B.* replied, *de injuria ſua propria, abſque hoc quod in lege eruditus, &c. & hoc petit, &c. & defendens ſimiliter.*

It was moved, that the Defendant ſhould demur to the Replication. *Atkinſon* excepted to the Traverſe and concluſion; for it cannot be tried by a Jury; for (ſays he) if Matters in law be to be tried by the Judges, *à fortiori* the Learning of the Law ought to be tried by them.

Per Manwood Chief Baron, it ſhall be tried by the Country, 3 *Leo.* 237. *Broughton* verſus *Prince*; which Caſe is cited, 3 *Cro.* 728. to be otherwiſe ruled; yet it was allowed there a good Iſſue, whether a Parſon of a Pariſh could ſpeak *Welſh.*

Hut. 20, 21. Whether a Plaint was levied according to the Cuſtom, was tried by a Jury who are directed by the Court, as to the Plaint, and whether it were purſuant to the Cuſtom, and are to find according to ſuch Directions.

In many Caſes the Jury are to inquire of the Knowledge and *Intent* of a Man, as where the *Nar.* is that the Defendant kept a Dog which killed the Plaintiff's Sheep, *ſciens canem ſuum ad mordendos oves conſuetum*; though *ſciens* be not traverſable, yet the Jury upon Evidence muſt inquire of it. *Lib.* 4. 18. Of a Man's Intent.

Of ſpiritual Things.

In ſome Caſes a Jury may try and find a *ſpiritual* Thing, as a Divorce, Matrimony, *&c.* and muſt take Notice thereof, upon Pain of Attaint. *Lib.* 4. 29. *Lib.* 7. 43. *Lib.* 9. *Vide hic, cap.* 2.

Baſtard.

The Jury may find Baſtardy, but it was pleaded it muſt be tried by Certificate.

Divorce.

So they may find a Divorce, for it is not Matter of Record, but a Matter in *Fait.*

In Treſpaſs *Quare clauſum fregit* in the County of *D.* where the Treſpaſs was committed in the County of *S.* upon Not guilty, if the Jury find the Defendant guilty in the County of *S.* their Verdict is void. But if they find him guilty generally, an Attaint lieth, *Finch* 400. becauſe this Treſpaſs is *local*; and what is local cannot be inquired of by Men of another County, for they can have no Conuſance of it.

The Jurors of one County may find any tranſitory Thing done in another County: Nay ſometimes they *muſt* find local Things in another County; as if the Heir pleads *riens per deſcent*, and the Plaintiff replies, Aſſets in a Pariſh and Ward within *London*, the Jury may find Aſſets in any County; the ſame Caſe againſt an Executor, who pleads *Plene Adminiſtravit*; the Jury may likewiſe find Aſſets in any Part of the World. And the Reaſon is, becauſe the Place is only named for neceſſity of Trial. But where the Place is *Part of the Iſſue*, it is otherwiſe. And therefore, if I promiſe in one Place to do a Thing in another, and Iſſue is upon the Breach, the Jury ought to come from the Place of the Breach. But if I promiſe in *London* to do a Thing at *Bourdeaux* in *France*, and iſſue upon the Breach, yet this ſhall be tried in *London for neceſſity*; becauſe otherwiſe it would want Trial; the Jury muſt inquire of the Breach at *Bourdeaux*. But if I promiſe in *France* to do a Thing in *France*, ſo that both Contract and Performance is beyond Sea, this wants Trial in our Law. *Lib.* 6. 47. *Lib.* 7. 23, 26, 27.

Of Things done in another County or Country, *vide cap.* 8. Roll. *Tit.* Trial, *f.* 571, 624.

If

If an Act be to be done all beyond Sea, it cannot be tried in *England*; but where Part is to be done in *England*, and Part beyond Sea, the whole shall be tried in *England*. *Vin. Abr.* Tit. *Trial*, 3. *pl.* 4.

When Part of the Act, especially the *original*, is to be done in *England*, and Part out of it, that Part that is to be performed out of it shall be tried here by twelve Men, if issue be taken thereupon; and those twelve Men shall come out of the Place where the Writ is brought. As where it was covenanted by Indenture by *Charter-party*, that a Ship should sail from *Blackney Haven* in *Norfolk* to *Muttrel* in *Spain*, and there remain by certain Days; in an Action of Covenant brought upon this *Charter-party*, the Indenture was alledged to be made at *Thetford* in the County of *Norfolk*, and upon pleading the Issue was joined; whether the Ship remained at *Muttrel* in *Spain* by the said certain Days. And it was adjudged that the Issue should be tried at *Thetford* where the Action was brought, because there the Contract took its *original* by making of the *Charter-party*, and so it has been often adjudged in the like Case *Co. Lit.* 261. *b.* 4 *Inst.* 141, 142. *Pasch.* 28 *Eliz. S. C.* by the Name of *Gyne* v. *Constantine.* 6 *Rep.* 48. *a. S. C.* cited as adjudged. *S. C.* cited *Godb.* 204. *pl.* 292. *per Coke*, Ch. J. as adjudged, that where the *original Act* was in *England*, and the subsequent Matter upon the Sea, the Trial shall be where the original Act is done. And so it was agreed that the Trial should be in the principal Case there. *Mich.* 11 *Jac. C. B. Leighton* v. *Green* and *Garret*. *Vin. Abr.* Tit. *Trial*, 3.

If a Man in Consideration of 100 *l.* promises in *London* to transport certain Commodities to *Turkey*, in an Action for not transporting, this may be tried in *London*. *Per Curiam.* *Vin. Abr.* Tit. *Trial*, 3. *pl.* 1.

S. P. per Fineux and *Townsend. Br.* Trials *pl.* 154. cites 11 *H.* 7. 16. but *Brian contra.*

If a Man be bound to do a Thing beyond Sea, the Bond is good, and the Condition void; for it is not triable in *England*, and so in effect impossible. *Vin. Abr.* Tit. *Trial*, 3. *pl.* 2. cites *Br.* Obligation *pl.* 70. cites 21 *E.* 4.

But *per Brian*, if a Man be bound in 20 *l.* to pay 10 *l.* at *Bourdeaux*, the Plaintiff may declare upon all the Deed. But if Defendant pleads Payment at *Bourdeaux*, *extra Regnum*, the Plaintiff shall be barr'd, because it is Parcel of the Count of the Plaintiff. *Ibid.*

A Con-

A Contract, made Part beyond Sea and Part here, shall be tried here *in toto*. *Vin. Abr.* Tit. *Trial*, 4. *pl.* 6.

Where an Agreement is at Land, and a Performance is at Sea, it shall be tried where the Agreement is made; and saying in *Partibus transmarinis infra Paroch'* is idle. 12 *Mod.* 34. *Hill.* 4 *W. & M.* 1692. *Can.* v. *Cary.*

In Debt upon Bond, Condition to pay 20 l. within 40 Days next after his personal Being at *Rome*, and his Return into *England*, the Defendant pleaded that the Plaintiff never was at *Rome*. It was objected that the Issue should be upon his Return into *England*, for the other was not triable: But to this it was replied, that if one was not triable, the other could not, because the Condition was in the *Copulative*; but that had it been in the *Disjunctive* it had been otherwise; and thereupon the Justices *doubted* how the Law should be in this Case. *Mich.* 24 *Eliz.* *Mullineaux's* Case, *Vin. Abr. Trial*, 4. *pl.* 6.

4 Inst. 142. cap. 22. *S. C.* in *B. R.*

Case upon an Assumpsit grounded upon a Policy made between Merchants for assurance of their Goods, whereby the Undertaker did assume, that such a Ship should sail from *Melcome Regis* in the County of *Dorset* unto *Abvile* in *France* safely without violence, *&c.* and declared that the said Ship in sailing towards *Abvile*, *viz.* towards the River of *Some*, in the Realm of *France*, was arrested by the *French* King, *&c.* whereupon issue was taken, and tried where the Action upon the Assumpsit was brought. It was insisted that this Issue arising merely from a Place out of the Realm, cannot be tried: But it was resolved that this Issue shall be tried where the Action was brought. And it was well agreed, that where the contract, and

and alſo the Performance thereof, is wholly done or to be done beyond Sea, and it ſo appears to be, there wants Trial in our Law. But here the Aſſumpſit, which is the Ground of the Action, was at *London*, and therefore muſt neceſſarily be tried (where the Action is brought) or ſhall not be tried at all. And the Arreſt which is in Iſſue is not the Ground of the Action but the Aſſumpſit, and the Arreſt is the Breach of the Aſſumpſit, and ſo muſt neceſſarily be tried where the Aſſumpſit, which is the Ground of the Action, was made. *Vin. Abr.* Tit. *Trial*, 4. *pl.* 8. cites 6 *Rep.* 47. *b.* in *Dowdale*'s Caſe cites *Mich.* 30 & 31 *Eliz.*

An Obligation with Condition that if the Obligor brings the Merchandizes of the Obligee from *Norway* beyond Sea to *Lynn* in *England*, that then, *&c.* this may be tried in *England*; *per Vaviſor* and *Fineaux* accordingly. *Br. Trials*, *pl.* 154. cites 11 *H.* 7. 16.

Retainer in *England* to ſerve beyond Sea ſhall be tried in *England*. *Br. Trials*, *pl.* 93. cites 7 *H.* 7. 8. *per Huſſey* Ch. J.

In the Caſe of *Drake* and *Beere*, *Trin.* 15 *Car.* 2. *B. R.* 1 *Siderf.* 151. 1 *Keb.* 528. this Difference was agreed by the Court, *viz.* That a Jury in an inferior Court may inquire of Things out of the Juriſdiction, if they be *but* for Increaſe of Damages, as is 1 *Cro.* 571. *Ireland* verſus *Blackwell*; but if they inquire of any Thing iſſuable out of that Juriſdiction, it is naught. 1 *Cro.* 101. 2 *Cro.* 503.

Error was brought to reverſe a Judgment given in the Palace-Court, in *Indebitat.* for that the Defendant was indebted to the Plaintiff *infra Juriſdictionem*, for nurſing of a Child, not

Juriſdiction of Courts.

not saying, the Nursing was *infra Jurisdictionem.*

Walb. Windham, Justice, held it good, for that it is a Debt every where, and not like a Debt that ariseth by Matter collateral: But *Twisden* Justice doubted. *Whitehead* versus *Brown*, *Pasch.* 15 *Car.* 2. *B. R.* 1 *Keb.* 512.

Vide Saunders's Reports, 1 Part, 73. *Peacock* against *Bell* and *Kendall.* The Plaintiff declared the Defendant *infra Jurisdictionem indebitatus fuisset* to the Plaintiff in 39 *l. pro diversis Merchandizis per quer. eidem Defendenti ante tempus illud vendit. & deliberat.* Held nought in an inferior Court, for not saying *ibidem vendit. &c.* but good in a superior Court, and in the County Palatine of *Durham*, for that is an original and superior Court.

Inferior Courts.

Estoppels.

When the Estoppel is found, the Court may judge according to the especial Matter.

The Jury may find *Estoppels*, as the taking of a Lease of a Man's own Land, by Deed indented, or the Delivery of a Deed before the Date; as in Debt by an Administrator, upon a Bond dated 4 *Aprilis* 24 *Eliz.* the Defendant pleaded that the Intestate died before the Date of the Obligation, and *issint nient son fait*; upon which they were at issue, and adjudged that the Jury might find that the Bond was delivered the third of *April*, because they are sworn *ad veritatem dicendam*; though the Parties are estopped to plead a Deed was delivered before the Date; but they may plead a Delivery after the Date, because it shall never be intended that a Deed was delivered before the Date, but after it may.

Estoppels.

But if the Estoppel or Admittance be within the same Record, in which Issue is joined, then the Jurors cannot find any Thing contrary to this, which the Parties have affirmed and admitted

mitted of Record, though it be not true, for the Court may give Judgment upon Matters *confeſſed* by the Parties; and the Jurors are not to be charged with any ſuch Thing, but only with ſuch in which the Parties *vary*. *Lib.* 2. 4. *Lib.* 4. 53. *Co. Lit.* 227.

A Decree in *Chancery* ſhall be tried by a Jury, and not by itſelf; for it is not a Record, but a Decree recorded. The *Chancery*, as it is a Court of Equity, is not a Court of Record, but touching Things agitated in the *Petty-Bag* Office, it is a Court of Record. Decree.

Exemplification of a Decree in *Chancery*, which has Bill and Anſwer, allowed good Evidence. *Keb.* 1 Part 21. Deeds, *&c.* Exemplification.

The Jury may find Deeds or Matter of Record, if they will, though not ſhewed in Evidence. *Finch* 400. They may inquire of Things done before the Memory of Man. *Lib.* 9. 34. Records not ſhewed.

The Jury in many Caſes may find Matters in a foreign County, Conditions, Records, Releaſes, *&c.* As in Battery of the Plaintiff's Servant in one County, and Loſs of Service in another County, this Damage in the other County may be inquired of by the Jury of the County where the Battery is laid. The like of Aſſets, becauſe tranſitory; otherwiſe of a local Treſpaſs, *&c.* Foreign County.

Nul tiel Record is not to be tried by a Jury, but upon the General Iſſue, *&c.* they may find a Record.

The Jury may find a Warranty, being given in Evidence, though it be not pleaded: Nay, the Jury may find that which cannot be pleaded; as in Treſpaſs, upon Not guilty, the Jury may find that the Defendant leaſed Lands Warranty.

for

Condition.

for Life, upon Condition, and entred for the Condition broken; though this cannot be pleaded without Deed, yet the Jury may find it. *Lit. Sect.* 366.

Where a collateral Warranty binds, this may well be given in Evidence; for although it doth not give a Right, yet in Law this shall bar and bind a Right. *Lib.* 10. 97.

Jury is bound by Estoppel unless the Party leaves the Fact at large by Pleading.

Where the Plaintiff's Title is by Estoppel, and the Defendant pleads the General Issue, the Jury are bound by the Estoppel; for here is a Title in the Plaintiff, that is a good Title in Law, and a good Title, if the Matter had been discloſed and relied on in Pleading; but if the Defendant pleads the special Matter, and the plaintiff will not rely on the Estoppel when he may, but take issue on the Fact, the Jury shall not be bound by the Estoppel; for then they are to find the Truth of the Fact which is against him. Thus in Debt for Rent on an Indenture of Lease, if the Defendant plead *Nil debet*, he cannot give in Evidence, That the Plaintiff had nothing in the Tenements; because, if he had pleaded that specially, the Plaintiff might have replied the Indenture and estopped him; but if the Defendant plead *Nihil habuit, &c.* and the Plaintiff will not rely on the Estoppel, but reply *habuit, &c.* he waves the Estoppel, and leaves it at large; and the Jury shall find the Truth notwithstanding his Indenture. *Salkeld* 276, 277.

CHAP.

CHAP. XI.

The Juries Oath; why called Recognitors in an Assize, and Jurors in a Jury. Of the Trial per medietatem linguæ; *when to be prayed, and when grantable. Of a Trial betwixt two Aliens, by all* Englisch. *Of the* Venire facias, per medietatem linguæ, *and of a Challenge to such Juries.*

THE Jury having heard their Evidence, let them now consider of their Verdict: But first they must remember their Oath, which in Effect is, *To find according to their Evidence*, and therefore they should have had it before the Evidence, but that the Form and Order of the *Venire facias* (which I have tied myself to follow) leads me to it after their Evidence, in these Words, *Ad faciend. quandam Juratam.* I have already shewed the Derivation of this Word *Jurata*, and what is the legal Acceptation of it; only observe with our Great Master *Littleton*, That the Word *Assise* is sometimes taken for a Jury; so, as the learned Commentator doth well paraphrase, that the Word *Assise* is *Nomen Æquivocum Æquivocans*, because sometimes it signifieth a Jury, sometimes the Writ of Assise, and sometime an Ordinance or Statute; but *Jurata* is *Nomen Æquivocum Æquivocatum*, because we always understand that Word (according to the aforesaid Definition) to be a Jury of twelve Men, so called, by reason of the Oath they take, *Truly to try the Suit of* Nisi prius, *between*

Assize, Enquest and Proof, are taken for the Word *Jury*. Vide 28 E. 3. 13.

See Chap. 1.

1 Inst. 154.

Assisa for *Jurata*.

The Juries Oath.

tween Party and Party, according to their Evidence.

Why called Recognitors in an Aſſize, and Jurors in a Jury.

And as in an Aſſiſe, the Jurors are called Recognitors, from theſe Words in the Writ of Aſſiſe *facere Recognitionem*; ſo upon a *Niſi prius*, they are called *Juratores*, from theſe Words in the *Venire facias*, *Ad faciend' quandam Juratam.*

12 Knights.

In ancient Time, the Jury, as well in Common Pleas, as in Pleas of the Crown, were twelve Knights, as appears by *Glanvil*, *Lib.* 2. *cap.* 14. and *Bracton*, *fol.* 116.

The next Words of the *Venire facias* are, *Inter partes prædictas.* In the fourth Chapter, I have inſtanced, That in ſome Caſes, a Jury ſhall be awarded betwixt the Party and a Stranger to the Writ and iſſue; I will now ſhew what the Jury ſhall be, when one of the Parties is an Alien, the other a Denizen; and when both Parties to the Iſſues are Aliens.

Jury *per medietatem linguæ.*

This Trial is called in *Latin*, *Triatio bilinguis*, or *per medietatem linguæ (a)*.. And this Trial by the Common Law was wont to be obtained of the King, by his Grant made to any

2 Keb. 315.

Company of Strangers, as to the Company of *Lumbards* or *Almaigns*, or to any other Company, that when any of them was impleaded, the Moiety of the Inqueſt ſhould be of their own Tongue. *Staund. Pleas of the Crown*, *Lib.* 3. *cap.* 7.

(*a*) People are diſtinguiſhed by their Language, and *Medietas Linguæ* is as much as to ſay, half *Engliſh*, and half of any other Tongue or Country whatſoever.

And

And this Trial in ſome Caſes, *per medietatem linguæ*, was before the Conqueſt, as appears by *Lamb. fol.* 91. 3. *Viri duodeni Jure conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis jus dicanto.* And of ancient Time it was called *Duodecim-virale judicium.* 1 *Inſt.* 155. *b.* Its Antiquity.

But afterwards this Law became univerſal: Firſt, by the Statute of 27 *Ed.* 3. *c.* 8. it was enacted, That in Pleas before the Mayor of the Staple, if both Parties were Strangers, the Trial ſhould be by Strangers. But if one Party was a Stranger, and the other a Denizen, then the Trial ſhould be *per medietatem linguæ.* But this Statute extended but to a narrow Compaſs, to wit, only where both Parties were Merchants or Miniſters of the Staple, and in Pleas before the Mayor of the Staple: But afterwards, in the 28th Year of the ſame King's Reign, *cap.* 13. it was enacted, Stamf. P. C. 158. b.

'That in all Manner of Enqueſts and Proofs, 'which be to be taken or made among A- 'liens and Denizens, be they Merchants or 'other, as well before the Mayor of the Staple, 'as before any other Juſtices or Miniſters, al- 'though the King be Party; the one Half of 'the Enqueſt or Proof ſhall be Denizens, and 'the other Half Aliens, if ſo many Aliens and 'Foreigners be in the Town or Place where 'ſuch Enqueſt or Proof is to be taken, that 'be not Parties, nor with the Parties in Con- 'tracts, Pleas, or other Quarrels, whereof ſuch 'Enqueſt or Proof ought to be taken; and 'if there be not ſo many Aliens, then ſhall 'there be put in ſuch Enqueſts or Proofs, 'as many Aliens, as ſhall be found in the ſame

'Towns or Places, which be not thereto Parties, nor with the Parties, as aforesaid is said, and the Remnant of Denizens which be good Men, and not suspicious to the one Party nor to the other.

Ibid. So that this is the Statute which makes the Law universal, concerning the *medietatem linguæ*; for though the King be Party, yet the Alien may have his Trial. And it matters not, whether the Moiety of Aliens be of the same Country as the Alien, Party to the Action, is: For he may be a *Portugal* and they *Spaniards*, *&c.* because the Statute speaks generally of Aliens. See *Dyer* 144.

The Return of a *Venire de medietate linguæ* ought to *(a)* shew which of the Jurors are Denizens, and which Aliens, and a full Number of each must appear to be sworn; if there be not sufficient to make up a full Number of six Denizens and six Aliens, the Justices of *Nisi prius* (*b*) may, by Construction of the Statutes, which give a *Tales de Circumstantibus*, award such a *Tales* for so many Denizens and Aliens as shall be wanting. *Cro. Eliz.* 818.

St. P. C. 159. b. Resolved, That if both Parties be Aliens, the Inquest shall be all *English*; for though the *English* may be supposed to favour themselves more than Strangers, yet when both Parties are Aliens, it will be presumed they favour both alike, and so indifferent. 21 *H.* 6. 4. But if the Plea be before the Mayor of the Staple, and both Parties Alien Mer-

(*a*) But this being only a Misreturn, is helped by Verdict in Cases within the Statutes of *Jeofail*. *Cro. Eliz.* 84.

(*b*) 10 *Co.* 104. *Cro. Eliz.* 305.

chants

chants of the Staple, it ſhall be tried by all Aliens. *Staundford's Pleas del Corone* 159. A *Scotchman* is a Subject, and ſhall not have this Trial. *Egyptians* are alſo excluded, when tried for Felony made by the Statute againſt them. 1 *Phil. & Mar. cap.* 4. 5 *Eliz. cap.* 20.

Where an Alien is Party, yet if the trial be by all *Engliſh*, it is not erroneous, becauſe it is at his Peril, if he will ſlip his Time, and not make uſe of the Advantage which the Law giveth him when he ſhould. *Dyer* 144. All Engliſh.

When an Alien is Plaintiff, and Defendant a Denizen; the Plaintiff, before the Awarding of the *Venire*, ought to ſuggeſt on the Roll, that he is an Alien born, and pray proceſs according to the Statute; he ought alſo to ſuggeſt in what Parts beyond Sea he was born, that Men of the ſame Country might be upon the Jury, if they could be found; but if he do not ſuggeſt this before the *Venire* is awarded, he ſhall not ſuggeſt it afterwards; neither ſhall he challenge the Array or Polls for that Cauſe. *St. P. C.* 159. *Dyer* 144. *b.*

If an Alien neglect to pray the Benefit of the Statute (*a*) before the Return of a common *Venire*, he can neither except to ſuch a *Venire*, nor pray a ſubſequent Proceſs *de medietate linguæ*. 3 *Bac. Abr.* 263. When the Alien ſhould pray a *Venire facias per medietatem.*

(*a*) If upon an Indictment of Felony againſt an Alien he plead guilty, and a common Jury be returned, if he doth not ſurmiſe his being an Alien, before any of the Jury ſworn, he hath loſt that Advantage; but if he alledge that he is an Alien, he may challenge the Array for that Cauſe, and thereupon a new Precept or *Venire* ſhall iſſue, or an award be made of a Jury *de medietate linguæ*; But it is more proper for him to ſurmiſe it upon his Plea pleaded, and thereupon to pray it. 2 *Hal. Hiſt. P. C.* 272.

Tales. If he hath a general *Venire facias*, he cannot pray a *Decem Tales*, *&c. per medietatem linguæ*, upon this; becauſe the *Tales* ought to purſue the *Venire facias*, 3 *E.* 4. 11, 12. And ſo if the *Venire facias* be *per medietatem linguæ*, the *Tales* ought to be *per medietatem linguæ*; as if ſix Denizens and five Aliens appear of the principal Jury, the Plaintiff may have a *Tales per medietatem linguæ*. *Lib.* 10. 104. But if in this Caſe the *Tales* be general, *de circumſtantibus*, it hath been held good enough; for there being no Exception taken by the Defendant, upon the awarding thereof, it ſhall be intended well awarded. *Cro.* 3 Part 818, 841.

Where the Trial of an Alien's Cauſe ſhall be by Engliſh. If the Plaintiff or Defendant be Executor or Adminiſtrator, *&c.* though he be an Alien, yet the Trial ſhall be by *Engliſh*, becauſe he ſueth *in auter droit*; but if it be averred that the Teſtator or Inteſtate was an Alien, then it ſhall be *per medietatem linguæ*. *Cro.* 3 Part 275.

Part Engliſh, and Part Aliens. *Mich.* 40 *&* 41 *Eliz.* The Queen's Attorney exhibited an Information againſt *Barre* and divers other Merchants, ſome whereof were *Engliſh* and ſome Aliens: After Iſſue, the Aliens prayed a Trial *per medietatem linguæ*. But all the Juſtices of *England* reſolved, That the Trial ſhould be by all *Engliſh*, and likened it to the Caſe of Privilege, where one of the Defendants demands Privilege, and the Court, as to his Companion, cannot hold Plea, there he ſhall be ouſted of his Privilege. *Sic hic.* *Moor* 557.

By the Statute of 8 *H.* 6. *cap.* 29. Inſufficiency or Want of Freehold is no Cauſe of Challenge to Aliens, who are impanelled with the *Engliſh*,

Engliſh, (notwithſtanding *Staundford*'s Opinion, *Pl. Coron.* 160.) for this Statute ſaith, That the Statute 2 *H.* 5. 3. ſhall extend only to Enqueſts betwixt Denizen and Denizen.

If the Defendant do not inform the Court that he is an Alien, upon awarding the *Venire facias*, and ſo pray a *Venire facias per medietatem linguæ*, he cannot challenge the Array for this Cauſe at the Trial, if the Jury be all Denizens; (notwithſtanding *Staundford*'s Opinion to the contrary, and the Books cited by him, *fol.* 159. *Pl. Cor.*) For the Alien at his Peril ſhould pray a *Venire facias per medietatem linguæ*. *Dyer* 357. *Vide Roll.* Tit. *Trial*, 643.

If the *Plaintiff* be an Alien, he muſt ſuggeſt it before the Awarding of the *Venire facias*; but if the *Defendant* be an Alien, the Plaintiff is allowed to ſurmiſe that, before or after the *Venire facias*, becauſe the Defendant's Quality may not be known to him before. 21 *H.* 7. 32.

If the Defendant be an Alien, on Notice given by his Attorney to the Plaintiff or his Attorney, the Plaintiff ought to enter it on the Roll, to have a Trial *de medietate* at his Peril; but the Court refuſed to award it for the Defendant, on his *Affidavit* that he is an Alien. *Keb.* 1 Part 547.

No *medietas linguæ* was at Common Law, but introduced by 28 *Ed.* 3. *c.* 13. for Contracts and Felonies. In what Caſes.

Denizens are as well thoſe who are *Engliſh* born, as thoſe who are Aliens and made Denizens by Patent.

On a Writ of Inquiry of *Damages*, the Inqueſt ſhall be all of *Engliſh*, and no Part of Aliens, for it is out of the Statute.

It seems agreed that the subsequent Statutes, which require Jurors to have Tenements to a greater Value, no way repeal the former Statute, though the *English half* of the Jury ought to have Value as in other Cases.

Where Issue is joined between an Alien and an *Englishman*, upon the Prayer of the Party, but not otherwise, a *medietas linguæ* shall be granted; but in the Case of an Alien arraigned *of Treason done here* he shall be tried by *all English*; for by 1 *Ma.* 10. the Trial in all Treasons is according to the Common Law: But it is otherwise in a Case of Felony, Petit Treason or Murder. *Vin. Trial*, 187.

There is no need in Case of an *Indictment* for any of the Grand Jury to be Aliens.

In Trials where *Medietas linguæ* is required, the Alien may be aided *de circumstantibus*. The Return upon the *Venire* ought to be *distinct*, 12 of each, and to be sworn *alternately*.

Wherever a *Medietas linguæ* is, a special Jury is to be returned: And where a Jury is *de medietate linguæ*, the Plaintiff is not bound unless the Jury be by six of the one and six of the other.

It must be prayed on the Award of the *Venire facias*, or it will not be allowed; for the Sheriff hath otherwise by the *Venire* no Power to return Aliens, or Conusance that an Alien is in the Case.

In this Trial the Court ought to be informed that one of the Parties is an Alien *before* the Award of the *Venire*.

If the *Defendant* be an Alien, the Plaintiff's Attorney on Notice ought to enter it on the Roll for a Party Jury at his Peril; but the Court will not award it for the Defendant on the Defendant's Affidavit that he is an Alien. *Vin. Trial*, 288, 289, 290.

CHAP.

CHAP. XII.

How the Jury ought to demean themſelves, whilſt they conſider of their Verdict; when they may eat and drink, when not; what Miſdemeanor of theirs will make the Verdict void: Evidence given them, when they are gone from the Bar, ſpoils their Verdict: For what the Court may fine them, and where the Juſtices may carry them in Carts, till they agree of their Verdict. An Amercement aſſeered by the Jury.

THERE is a Maxim, and an old Cuſtom in the Law, That the Jury ſhall not eat nor drink after they be ſworn, till they have given their Verdict, without the Aſſent and Licence of the Juſtices; and that is ordained by the Law for eſchewing of divers Inconveniences that might follow thereupon; and that eſpecially if they ſhould eat or drink at the Coſts of the Parties; and therefore if they do ſo, it may be laid in Arreſt of Judgment.

Jurors ought not to eat or drink. Dr. and Student 158.

But with the Aſſent of the *Juſtices* they may both eat and drink; as if any of the Jurors fall ſick before they be agreed of their Verdict, ſo ſore that he may not commune of the Verdict, then by the Aſſent of the Juſtices he may have Meat or Drink, and alſo ſuch other Things as be neceſſary for him; and his Fellows alſo at their own Coſts, or at the indifferent Coſts of the Parties, if they ſo agree, or by the Aſſent

For by Aſſent of the Juſtices they may eat and drink.

Br. Jurors.

of the Juſtices, may both eat and drink: And if the Caſe ſo happen, that the Jury can in no wiſe agree in their Verdict; as if one of the Jurors knoweth in his own Conſcience the Thing to be falſe, which the other Jurors affirm to be true, and ſo he will not agree with them in giving a falſe Verdict; and this appeareth to the Juſtices by Examination; the Juſtices may in ſuch Caſe ſuffer the Jury to have both Meat and Drink for a Time, to ſee whether they will agree. And if they will in no wiſe agree, the Juſtices may take ſuch Order in the Matter as ſhall ſeem to them by their Diſcretion to ſtand with Reaſon and Conſcience, by awarding of a new Inqueſt, and by ſetting Fine upon them, that they ſhall find in Default, or otherwiſe, as they ſhall think beſt by their Diſcretion; like as they may do, if one of the Jury die before the Verdict, *&c. Doct. and Student* 158.

New Inqueſt when the Jury cannot agree.

If the Jury, after their Evidence given unto them at the Bar, do at their own Charges eat or drink, either before or after they be agreed on their Verdict, it is fineable, but it ſhall not avoid the Verdict; but if before they be agreed on their Verdict, they eat or drink at the Charge of the Plaintiff, if the Verdict be given for him, it ſhall avoid the Verdict; but if it be given for the Defendant, it ſhall not avoid it; *& ſic e converſo.* But if after they be agreed on their Verdict, they eat or drink at the Charge of him for whom they do paſs, it ſhall not avoid the Verdict. 1 *Inſt.* 227. *b.*

Where, if the Jury eat or drink, it ſhall avoid the Verdict, and where only fineable.

To give the Jury Money, makes their Verdict void; by two Juſtices. *Leon.* 1 Part 18.

If

If the Plaintiff, after Evidence given, and the Jury departed from the Bar, or any for him, do deliver any Letter from the Plaintiff to any of the Jury, concerning the Matter in Iſſue, or any Evidence, or any Eſcrow, touching the Matter in Iſſue, which was not given in Evidence, it ſhall avoid the Verdict, if it be found for the Plaintiff; but not if it be found for the Defendant; *& ſic e converſo.* But if the Jury carry away any Writing unſealed, which was given in Evidence in open Court, this ſhall not avoid their Verdict, albeit they ſhould not have carried it with them. 1 *Inſt.* 227. *b.*

What delivered to the Jury after Evidence, ſhall avoid their Verdict. *Littleton's Rep.* 69. *Keb.* 1 Part 824.

By the Law of *England*, a Jury after their Evidence given upon the Iſſue, ought to be kept together in ſome convenient Place, (*a*) without Meat or Drink, or Fire (*c*) (which ſome Books call an Impriſonment) and without Speech with any, unleſs it be the Bailiff, and with him only, if they be agreed. After they be agreed, they may in Cauſes between Party and Party, give a Verdict; and if the Court be riſen, give a privy Verdict before any of the Judges of the Court, and then they may eat and drink, and the next Morning in open Court they may either affirm, or alter their privy Verdict; and that which is given in Court ſhall ſtand. But in criminal Caſes of Life or Member, the Jury can give no privy Verdict, but they muſt give it openly in Court. *Ibid.*

How the Jury ought to be kept by the Bailiff.

When they may eat and drink, ſee *Smith's Comwealth* 74.

Where there can be no privy Verdict.

(*a*) When the Jury depart from the Bar, (*b*) a Bailiff ought to be ſworn to keep them together, and not to ſuffer any to ſpeak to them. 2 *H. H. P. C.* 296.

(*b*) That a Bailiff is to be ſworn in a *Civil* as well as in a *Criminal* Caſe. *Palm.* 380.

(*c*) 2 *H. H. P. C.* 297.

A privy

A privy Verdict may be taken in a *Quo warranto*, Perjury or wherever the King is Party, unless in Case of Life and Death. *Keb.* 3 Part 459.

Where the Jury cannot be discharged before Verdict.

Neither can a Jury, sworn and charged in Case of Life or Member, be discharged by the Court, or any other, but they ought to give a Verdict. And the King cannot be nonsuit, for he is, in Judgment of Law, ever present in Court; but a common Person may be nonsuit. And in Civil Actions, the Justices, upon Cause, may discharge the Jury. *Br. Inquest*, 68, 47, 39, *&c.*

The King cannot be nonsuit.

1 Inst. 227. b.

But this is against common Practice; and I have known, that after a Jury of Life and Death have been sworn, and charged with Prisoners arraigned, the Judge having been credibly informed, that it was a Jury pack'd to favour some Prisoner, has discharged that Jury, and made the Sheriff return another presently.

Information.

In an Information by an Informer, *qui tam, &c.* the Informer may be nonsuited. 1 *Inst.* 139. *Coke's Entries*, Tit. *Information*, 394.

In *Hillary* Term *Sexto H.* 8. *Rotul.* 358. It was alledged in Arrest of the Verdict at the *Nisi Prius*, That the Jurors had eat and drank. And upon Examination it was found, that they had first agreed, and that returning to give their Verdict, they saw *Rede* Chief Justice in the Way, going to see a Fray, and they followed him, *Et in veniendo viderunt scyphum & inde biberunt.* And for this every one of them was fined 40 *d.* And the Plaintiff had Judgment upon the Verdict. *Dyer* 37.

Jurors fined.

Jurors at the *Nisi Prius* fined in Bank, for eating Pears, and drinking Ale.

And *Dyer* 218. At the *Nisi Prius*, the Jury after their Charge given, returned and said, That they were all agreed except one, who had eat a Pear,

Pear, and drank a Draught of Ale, for which he would not agree; and at the Requeſt of the Plaintiff, the Jury was ſent back again, and found the Iſſue for the Plaintiff. And the Matter aforeſaid being examined by the Oath of the Jurors *ſeparatim*, and the Bailiff who kept them, and found true, the Offender was committed, and afterward found Surety for his Fine. *Si, &c.* And *Fitzherbert*, the then Juſtice of Aſſiſe, gave him Day *in Banco, &c.* At which Day a Fine of twenty Shillings was then aſſeſſed. *Et quoad Ball. Curia adviſare vult.* But the Plaintiff had his Judgment.

In Treſpaſs by *Mounſon* againſt *Weſt*, the Jury was charged, and Evidence given, and the Jurors being retired into a Houſe for to conſider of their Evidence, they remained there a long Time without concluding any Thing; and the Officers of the Court who attended them, ſeeing their Delay, ſearched the Jurors, if they had any Thing about them to eat; upon which Search it was found, that ſome of them had Figs, and others Pippins, for which, the next Day the Matter was moved to the Court, and the Jurors were examined upon Oath, and two of them did confeſs, that they had eaten Figs before they had agreed of their Verdict; and three other of them confeſſed, that they had Pippins, but did not eat of them, and that they did it without the Knowledge or Will of any of the Parties. And afterwards the Court ſet a Fine of 5 *l.* upon each of them which had eaten; and upon the others which had not eaten, 40*s.* But upon great Advice and Conſideration had, and Conference with the reſt of the Judges, the Verdict was held to be good, notwithſtanding the ſaid Miſdemeanor. *Leon.* 1 Part 133.

Fined for having Figs and Pippins about them.

And

Fined for eating Raisins and Dates.

And see the Book of *Entries* 251. The Jurors, after they went from the Bar *ad seipsos* of their Verdict to advise *comederunt quasdam species, scil.* Raisins, Dates, *&c.* at their own Costs, as well before as after they were agreed of their Verdict. And the Jurors were committed to Prison, but their Verdict was good, although the Verdict was given against the King.

Fineable for having Sweet-meats, *&c.* about them, tho' they do not eat them. See *Plo. Com.* 519. One fined and imprisoned for having Sugar-candy and Liquorish about him.

In *Ejectione firmæ* it was found for the Defendant; three of the Jurors had Sweet-meats in their Pockets, and those three were for the Plaintiff, until they were searched and the Sweet-meats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, That whether they eat or nor, they were fineable for having of the Sweet-meats with them, for that is a very great Misdemeanor. *Godbolt* 353.

Jurors carted.

40 *Assise Placito* 11. The Justices said, That if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them, till they are agreed.

The same Evidence given to the Jury, after they were gone from the Bar, spoils the Verdict.

The Jury were gone from the Bar to confer of their Verdict, and one of the Witnesses before sworn on the Defendant's Part, was called by the Jurors, and he recited again his Evidence to them, and after they gave their Verdict for the Defendant. And Complaint being made to the Judge of the Assises of this Misdemeanor, he examined the Inquest, who confessed all the Matter, and that the Evidence was the same in Effect that was given before, *& non alia nec diversa.* And this Matter being returned by the *Postea*, the Opinion of the Court was, That the Ver-

Verdict was not good, and a *Venire facias de novo* was awarded. *Cro.* laſt Part 189.

Trinity-Term 1653. between *Web* and *Taylor*, Copies of a Bill, Anſwer and Depoſitions were proved, but not all read, and delivered to the Jury, who carried them with them from the Bar in a Bundle, which they laid by them and did not look on; yet their Verdict at the Bar was ſet aſide for this Cauſe, and the Court would not regard their ſaying, that they did not read them, for they might ſay that to ſave themſelves; it being a Fault to take any Thing without the Court's Knowledge. *Roll. Trial*, 714. *pl.* 6.

If the Names of the Jurors be tranſpoſed in the Panel of the *Habeas Corpora*, as thoſe which were firſt in the Panel of the *Venire facias*, be ſet laſt in the *Habeas Corpora*, 'tis good Cauſe for a new Trial. So held in the *Exchequer*, 1694.

If the *Venire* be returned, but not filed, the Panel may be changed; but by *Wyndham*, Not reaſonable the Jury returned ſhould be changed without Motion. *Keb.* 1 Vol. 562.

If one of the Parties ſay to the Jury after they are gone from the Bar, *Your are weak Men, it is as clear of my Side as the Noſe in a Man's Face*; this is new Evidence, for his Affirmation may much perſwade the Jury, and therefore ſhall quaſh the Verdict. *Roll. Trial*, 716. *pl.* 20. If a Party ſpeak to them.

So if any of the Party's Servants ſpeak to the Jury, and the Verdict goes for his Maſter, it may be quaſhed; but if for the other Side, 'tis only fineable. *Keb.* 300, 1 Part.

So if any Thing be read to them, which they ought not to have with them, as a Book of Depoſitions, ſome whereof were read in Evidence. *Prat*'s Caſe 21 *Jac. Roll. Trial* 716. *pl.* 19.

The

Eſcrow delivered to a Juror before he was ſworn, vitiates the Verdict.

The Plaintiff delivered an Eſcrow to a Juror impanelled, before he was ſworn, who afterwards being ſworn, and gone with the Jury from the Bar, to conſider of the Verdict, ſhewed the ſame Eſcrow to his Companions, who found for the Plaintiff. The Miniſter who kept the Inqueſt, informed the Court hereof, and the Jury being examined confeſſed the Matter aforeſaid, upon which Judgment was ſtayed; for after the Jury are ſworn, they ought not to ſee nor carry with them any other Evidence but what was delivered to them by the Court: Afterwards the Plaintiff ſaid, That the Eſcrow proved the ſame Evidence which was given to them at Bar by him; wherefore it was not ſo bad as if it had been new Evidence not given before: *Sed non allocatur.* 11 *H.* 4. 17. *Roll. Trial*, 714. *pl.* 8.

Church Book delivered to the Jury, Act of Court.

Paſch. 38 *Eliz. Inter Vicary* and *Farthing*, *at* the *Niſi Prius.* The Iſſue was about Nonage, and two Church Books were given in Evidence, one whereof was delivered to the Jury in Court, by the Aſſent of Parties, and afterwards the other was delivered to the Jury out of the Court, by the Solicitor of the Plaintiff, without the Aſſent of the Court; and a Verdict for the Plaintiff; and this was indorſed on the *Poſtea*; the Queſtion was, Whether this ſhould make the Verdict void, or no? For the Juſtices differed in Opinion, *Popham* and *Gawdy* that it ſhould not, *Fenner* and *Clench* that it ſhould; the Negative Juſtices gave theſe Reaſons; That the Book was delivered in Evidence in the Court, and ſo the other Party might anſwer to it, and that the Court had informed the Jury of the Validity thereof, how far they were to believe, with many other Reaſons: But the Affirmative was urged, becauſe

because there might be some Matter in this Book to induce them otherwise than was intended before, and because it was delivered on his Part, for whom the Verdict passed, without the Court's Assent; yet Judgment was afterwards given for the Plaintiff. *Cro. Eliz.* 411. *Roll. Trial*, 715. *pl.* 11. See *Moor's Reports* 452. The Books differ, for *Cro.* makes *Cleneh* give his Opinion for the Verdict. But *Moor* brings him on the other Side, which I conceive is truest; and for my Part, I know no Reason why foisting of Evidence to the Jury, without the Court, should have any Favour at all.

In the Case of *Taylor* and *Webb*, *Trin.* 1653. *B. R. Twisden* moved to set aside a Verdict given at Bar, because that after Evidence, when the Writings were delivered to the Jury, some Writings which were not sealed (and therefore ought not to be delivered to the Jury) were delivered by a Stranger to the Jury. Consider the Reasons in the former Cases.

Hale, Counsel of the other Side, produces an *Affidavit* of the Foreman of the Jury, that they made no use of them in giving their Verdict, and that most of those Writings were read in Court, in Evidence upon the Trial; and *Hale* said, That if this should avoid the Verdict, then it would be in the Power of any Stranger unknown, and against the Mind of the Parties, to avoid any Verdict.

Rolle Chief Justice: The *Affidavit* of the Jury ought not to be allowed to make good their own Verdict, for now they are (as it were) Parties, and have offended, and shall not be allowed by their own Oath to take off their Offence; and it is the Duty of the Jury to look what Writings they receive before they go from the Bar; and if any such Paper be wrap'd up among other

Papers delivered to them by the Court, ſo ſoon as they have diſcovered it, they ſhould call in the Tipſtaff who keeps them, and deliver it to him, and to teſtify they made no uſe of it; and he ſaid it would be dangerous to give the leaſt Way to the delivering of any Writings to a Jury.

And at another Day, *Rolle* cited 11 *H.* 4. 18. The Plaintiff (before the Trial) delivered a Breviate of his Evidence to the Jury, which contained no more than was proved in Court, yet by this the Verdict was avoided: So *Mich.* 31 *Eliz. C. B. Metcalf* and *Dean.* After the Jury were gone from the Bar, they ſent for one of the Witneſſes and re-examined him, who gave the very ſame Evidence that he had before given in Court, yet the Verdict was avoided; and the Reaſon of both is, a Fear and Jealouſy that other Matters might be given, *&c. Roll. Trial*, 715. *pl.* 13.

37 *Eliz. Farthing*'s Caſe: A Paper not under Seal, which was given in Evidence, was delivered to the Jury; this did not avoid the Verdict, becauſe here can be no ſuch Fear; and by *Rolle*, if any Writing (though not given in Evidence) be delivered to the Jury by the Court, it ſhall not avoid the Verdict. And in the principal Caſe the Verdict was avoided.

Eſcrow from one who was no Party.

Hill. 40 *Eliz. Rot.* 147. In Arreſt of Judgment after Verdict, it was alledged, that a Juror delivered to his Companions an Eſcrow for Evidence to them, which was not given in Evidence at the Trial; and adjudged no Cauſe to arreſt Judgment, unleſs it had been received from one of the Parties, which did not appear, *Moor* 546. but otherwiſe if it had been given by a Party, and the Jury had found for him. *Roll. Trial*, 715. *pl.* 15, 16.

In

The Jury ought not to *see or carry with them any other Evidence*, than that which is delivered them by the Court, and by the Party himself brought into Court and given in Evidence, for it is Cause to arrest the Judgment; as upon Evidence to a Jury to prove *J. S.* to be Heir to *W. S.* a *Pedigree* drawn by a Herald at Arms is not Evidence, nor will the Court suffer the Jury to have it with them; for it is only private Information without any Proof by Office or other substantial Matter.

A Jury may have with them an Exemplification of Witnesses examined in Chancery upon Oath *who are dead*; but if the Exemplification comprehends some Witnesses who are dead and *some who are living*, they shall not have it with them.

No Deed or Writing shall be *privately* delivered to a Jury that was not *openly* shewed; nor Copies of Books, *&c.* but with the *Assent of Parties.*

Writings or Books *not under Seal*, or a Fine indented not exemplified, cannot be delivered to the Jury *without Assent of Parties*; though if delivered by the Court without such Assent, this will not avoid the Verdict, where they are before given in Evidence.

Nothing can be delivered to a Jury *without Assent* but that which is of *Record or under Seal*, as the *Chirograph of a Fine*, though it may be given in Evidence, is not to be delivered to a Jury, and indeed if Evidence *under Seal* be read in Court, the Jury regularly ought to have it with them, but not if it be not under Seal.

Where there are several Depositions under *the Great Seal* given in Evidence, some of them are read, some not, these the Jury may have with

them as being under the Great Seal, and might be all relative to the ſame Purpoſe. *Vin. Trial*, 372.

In the Caſe of *Duke* and *Ventris*, *Mich.* 1656. *B. R.* tried at Bar, one Mr. *Beverley* of *Suffolk*, a Barriſter, was returned of the Jury, who (having been at a Trial of the ſame Cauſe above twenty Years before, in the *Exchequer*, and heard there great Evidence to make a Deed fraudulent, which was now the Conteſt) demanded of the Court, whether he ought to inform the reſt of the Jury privately of this, or conceal it, or declare it in open Court? The Court ordered him to come into Court, and deliver all his Knowledge which he heard then proved (which Evidence was not now given, becauſe the Parties were dead); and ſo he did, being not ſworn again, but only upon the Oath taken as a Juryman.

Nota.

And certainly it is of dangerous Conſequence to receive a Verdict againſt Evidence, given on Suppoſal that ſome of the Jury knew otherwiſe, or on private Information given by one Juryman to the Reſt, where he cannot be croſs-examined; and let ſuch Jurors beware of Attaint, but the beſt Way is (as before) in open Court.

Jury adjourned.

In a Writ of Error, the firſt Error aſſigned was, That *Termino Trin.* ten Jurors, and no more, did appear. This *ex aſſenſu partium* was adjourned until *Craſtino Animar.* on which Day two others came in and were ſworn, being of the firſt Panel.

The Court were all clear of Opinion, That this is no Error, this being good enough, they being all to be called again. *Leon.* 3 Part 38.

If

If a Juror depart after he is sworn, he shall be fined and imprisoned, and by Assent of Parties, another Juror may be sworn. *Bro. Jurors* 46. *Lib.* 5. 40. Juror depart.

If a Man be nonsuited after the Jury is ready to give their Verdict, the Court may cause the Amercement of the Plaintiff to be presently affeered by the Jurors. *Lib.* 8. 39.

If a Jury give their Verdict by Lot, it is a Misdemeanor and Cause of a new Trial, although in *Prior* and *Powel*'s Case, *Keble* 1 Vol. 811. a new Trial was denied, because the Lot seemed there very innocent.

But see *Keble*'s 3 Part 805. A Jury, on *Affidavit*, that they gave their Verdict on throwing Cross and Pile, were bound to appear to an Information; which 'tis said broke one of the Jurors Hearts. *Keb.* 1 Part 811.

Upon a Motion for a new Trial, on the Judge's Certificate that the Verdict was against Evidence in Perjury; the Court said, there could be no new Trial for or against the King, and denied it, but said, the Certificate might mitigate the Fine. *The King* against *Marchant*, Keb. 3 Part 404, 405.

Nota; The Court will not award new Trials on the Jurors gainsaying their Verdicts, unless the Judge, before whom it is tried, conceived the Verdict to be given against Evidence. *Per Cur.* 13 *Car.* 2. *B.* 5.

The Jury appearing and sworn in an Information of Extortion, the Court would not discharge the Jury upon a *Cessat Processus*, so the Attorney General caused the Clerk of the Crown to enter a *Noli prosequi*.

The Duke of *Richmond* versus *Wise*, *Pasch*, 23 *Car.* 2. *B. R.* In an Ejectment the Parties had a Trial at Bar, and a Verdict for the Plain- 1 Vent. 124,

tiff. The Court was moved to ſet aſide this Verdict, upon an *Affidavit* made of theſe Miſdemeanors in the Jury, *viz.* That they had Bottles of Wine brought them before they had given their Verdict, which were put into a Bill together with Wine and other Things, which were eat and drunk by the Servants of the Jury, and the Tipſtaffs that attended them at the Tavern where they were conſulting of their Verdict. That this Bill (after the Verdict given) was paid by the Plaintiff's Solicitor; and that after they had given up their privy Verdict, they were treated at the Tavern by the Plaintiff's Solicitor before the Affirmance of it in Court.

Miſdemeanor of a Jury.

Council being heard on both Sides as to thoſe Matters, the Court delivered their Opinion *ſeriatim*, that the Verdict ſhould ſtand. They ſaid, they were not upon a diſcretionary ſetting aſide of the Verdict, as when the Jury goes againſt Evidence: But whether theſe Miſcarriages ſhall avoid it in Point of Law?

They all agreed, That if the Jury eat or drink at the Charge of the Party for whom they find the Verdict, it diſannuls the Verdict; but here it doth not appear, That the Wine they drank was had by the Order of the Plaintiff, or any Agent for him: 'Tis true, in regard his Solicitor paid for it afterwards, it doth induce a Preſumption that he beſpoke it; but that again is extenuated by its being put into a Bill with other Things that were allowable; and if the Verdict ſhould be quaſhed for this Cauſe, it muſt be entred upon the Roll, that it was for drinking at the Plaintiff's Charge; and it is not proved that this Wine was provided by him: And as to the other Part, That they received a Treat from the Plaintiff, after their privy Verdict given, and before

Eating at the Party's Charge ſpoils the Verdict.

Being treated by the Plaintiff after a privy Verdict, does not ſpoil the Verdict.

before it was given up in Court, that ſhall not avoid the Verdict.

But if the Defendant had treated them, and they had changed their Verdict, as they might have done in Court, it ſhould then have been void. *Co. Lit.* 227. *b.* If after the Jury be agreed on their Verdict (which the Chief Juſtice ſaid muſt be intended ſuch an Agreement as hath the Signature of the Court put upon it, *viz.* a privy Verdict) they eat and drink at the Charge of him for whom they do paſs it, it ſhall not avoid the Verdict; and if it ſhould, the Court ſaid, moſt Verdicts given at the Aſſizes would be void, for there 'tis uſual for the Jury to receive a Collation after the privy Verdict given, from him for whom they find.

Unleſs it induces them to change their Verdict.

But ſuch Practice ought not to be, and if any of the Parties, their Attornies or Solicitors ſpeak any Thing to the Jury, before they are agreed relating to the Cauſe, *(viz.) That it is a clear Cauſe, or I hope you will find for ſuch a one*, or the like, and they find accordingly, it ſhall avoid the Verdict; but if Words of Salutation, or the like, paſs between them, (as was endeavoured to be proved) it ſhall not. Alſo if, after they depart from the Bar, any Matter of Evidence be given them, as Depoſitions, or the like, though the Jury ſwear they never looked on them, yet that ſhall quaſh their Verdict. But they all held in this Caſe, that though there was great Matter of Suſpicion, yet there was not Matter of clear Proof (as there ought to be) ſufficient to diſannul this Verdict; but they ſaid, it was a great Miſdemeanor in the Jury, for which they ought to be fined, and that the Plaintiff's Solicitor had carried himſelf with much Blame and

Speaking to the Jury by a Party converned, where it avoids the Verdict.

Words of Salutation do not.

Papers given them after their Departure from the Bar, will avoid it.

Tipſtaffs fin'd for not keeping the Jury from Wine.

Indiſcretion; and the two Tipſtaffs which attended the Jury, for that they were not more careful, but connived at theſe Matters, were fined the one forty Shillings (who appeared moſt in Fault) and the other twenty Shillings. 1 *Vent.* 124.

One committed for ſending to know the Privy Verdict.

Anonymus, *Mich.* 21 *Car.* 2. *B. R.* One was committed for ſending a Note to a Juryman, (after a privy Verdict given) to know what Verdict they gave. 1 *Vent.* 49.

The Jury being in great Doubt agreed to try the Event by toſſing up a Sixpence; and the Chance being for the Plaintiff, they found a Verdict accordingly. The Court ſet their Verdict aſide, and granted a new Trial; and ordered the Jury, who were of the County of *Northumberland*, to attend the Court the next Term. *Jones T.* 83. 2 *Lev.* 208.

CHAP.

CHAP. XIII.

What Punishment the Law hath provided for Jurors offending; as taking Reward to give their Verdict. Of Embraceors. Decies tantum. *Attaint. Several Fines on Jurors. What Issues they forfeit, and of Judgment for striking a Juror in* Westminster, &c.

YOU have already heard how the Court may fine the Jurors for their Misdemeanors in giving up their Verdict; I will proceed in shewing what Punishments they are liable unto, if they neglect their Duty; and doubtless no Men have more need of knowing what Penalties the Law inflicts on their Offences, than common Jurors, who too often being pre-engaged with Favour to the Plaintiff, or Malice against the Defendant, *& sic e converso*, or with common Interest (as they call it) where Tithes or Commons are in Question, will neither hearken to their Evidence nor Direction of the Judge, but subvert the whole Drift of the Common Law, which will have them of the Neighbourhood where the Fact was committed, to the End that they knowing most of the Fact, may consequently give the best Verdict; yet contrariwise, Jurors who live neerest, do now-a-days, most commonly so fetter themselves with Favour or Animosities to the Parties; that those which live fartheſt off (as Juries from other Counties) for the most part give the cleareſt Verdicts. And

how ſhould the Judges remedy this Miſchief but by ſeverely puniſhing thoſe Juries which offend? The Law in this will be their Guide, for without Doubt, (excepting Life and Member) the Law hath provided more ſevere Puniſhments againſt Juries, than againſt any other Offenders whatſoever, as well knowing that *corruptio optimi eſt peſſima:* And common Jurors generally have nothing to do with this Verſe, *Oderunt peccare boni, virtutis amore*; therefore it is fit they ſhould be concerned in the next, *Oderunt peccare mali, formidine Pœnæ*; wherefore the Deſcription of what this *Pœna* is, ſhall be the Subject of this Chapter.

The Penalty of Jurors taking Rewards.

If any Juror take a Reward to give his Verdict, and be thereof attainted, at the Suit of other than the Party, and maketh Fine, he which ſueth ſhall have Half the Fine; and if any of the Parties to the Plea bring his Action againſt ſuch Juror, he ſhall recover his Damages. And the Jurors ſo attainted ſhall have Impriſonment for one Year, which Impriſonment ſhall not be pardoned for any Fine: This is by the Statute of 34 *E.* 3. *cap.* 8.

Shall not ſerve of any other Inqueſt.

5 *E.* 3. *cap.* 10. it is accorded, That if any Juror in Aſſizes, Juries or Inqueſts, take of the one Party, or of the other, and be thereof duly attainted, that hereafter he ſhall not be put into any Aſſizes, Juries or Inqueſts; and nevertheleſs he ſhall be commanded to Priſon, and further ranſomed at the King's Will. And the Juſtices, before whom ſuch Aſſizes, Juries and Inqueſts, ſhall paſs, ſhall have Power to inquire and determine according to this Statute.

Impriſoned and ranſomed, (that is) fined.

A Man would think that theſe Statutes ſhould have frighted any Juror from taking Rewards to give his Verdict. But,

——— *Quid non mortalia pectora cogis*
Auri ſacra fames?

So ſacred is this Love of Money, that Conſcience herſelf muſt vail to it, and not ſtand in Competition with ſuch Allurements: Wherefore the Law did redouble its Force; nay more, produced a *Decies tantum, ſcil.* That a Juror taking Reward to give his Verdict, ſhall pay ten Times as much as he hath taken; which Forfeiture, methinks, ſhould make even thoſe who love Money beſt, refuſe to take Money upon ſuch an Account, becauſe it is like a Canker in their Eſtates, depriving them in the End, of ten Times more than it brought; for which hear the Statute 38 *E.* 3. *cap.* 12.

Item, As to the Article of Jurors, in the 34th Year, it is aſſented and joined to the ſame, that if any Jurors in Aſſizes ſworn, and other Inqueſt to be taken between the King and Party, or Party and Party, do any Thing take by them or other of the Party, Plaintiff or Defendant, to give their Verdict, and thereof be attainted by Proceſs contained in the ſame Article, be it at the Suit of the Party that will ſue for himſelf, or for the King, or any other Perſon, every of the ſaid Jurors ſhall pay ten Times as much as he hath taken: And he that will ſue ſhall have the one Half, and the King the other Half; and that all the Embraceors, that bring or procure ſuch Inqueſts in the Country, to take Gain or Profit, ſhall be puniſhed in the ſame Manner and Form as the Jurors. And if the Juror or Embraceor ſo attainted have not whereof to make gree, in the Manner aforeſaid, he ſhall have the Impriſonment of one Year. And the Intent of the

Decies tantum.

Embraceors.

the King, of great Men, and of the Commons, is, that no Justice or other Minister shall inquire of Office, upon any of the Points of this Article, but only at the Suit of the Party, or of other, as afore is said.

Upon which Statute there is a Writ called a *Decies tantum*; and who will may bring it, for it is a popular Action, and lies, (as you see) where any of the Jurors, after he is sworn, taketh of one Party or of the other, or of both (and then he is called *Ambidexter*) any Reward to give his Verdict, *&c.* And it may be brought against all the Jurors and Embraceors, although they take several Sums of Money, and although the Jury give no Verdict, or a true Verdict. But it doth not lie against an Embraceor, if he taketh no Money, and embaces, or taketh Money, and doth not embrace. See *Bro.* Tit. *Decies tantum* 13. and *F. N. B.* 171.

Ambidexter.

So *F. N. B.* saith; but for my Part, I think he is mistaken, for the Statute mentioneth nothing of his taking Money; and in my Opinion, the Case of 37 *H.* 6. 13. is full against him.

A *Decies tantum* lies against the Jurors, though they do not give a Verdict, if they take Money. *F. N. B.* 171.

Embracery defined.

Embracery is defined in general to be an Attempt by either Party, on a Stranger, to corrupt or influence a Jury, or to incline them to favour one Side, by Gifts or Promises, Threats or Perswasions, or by instructing them in the Cause, or any other Way, except by opening and enforcing the Evidence by Counsel at the Trial, whether the Jurors give any Verdict or not, and whether the Verdict be true or false. 3 *Bac. Abr.* 284.

Also

Alſo it is an Offence of this Kind barely to labour a Juror to appear and act according to his Conſcience, or for any Perſon to labour a Juror not to appear; but it is no Offence for the Party himſelf, or for any Perſon, who can juſtify an Act of Maintenance, to labour a Juror to appear and give a Verdict according to his Conſcience. *Ibid.*

Alſo it is an Offence to give Money to a Juror after the Verdict, unleſs it be openly and fairly given to all alike in Conſideration of the Expences of their Journey and Trouble of their Attendance. *Ibid.*

So the bare giving of Money to another to be diſtributed amongſt the Jurors ſavours of Embracery, whether any of it be diſtributed or not; and it is an Offence of the like Kind for a Perſon, by indirect Means, to procure himſelf, or another, to be ſworn of a *Tales*, in order to ſerve one Side; alſo it is as Criminal in a Juror, as in any other Perſon, to endeavour to prevail on his Companions to give a Verdict on one Side, by any other Arguments beſides the Evidence produced, and the general Obligations of Conſcience. *Ibid.*

The Offence of Embracery is puniſhable at Common Law by Indictment or Action; and if it were not known before the Trial, will be a good Cauſe to ſet aſide the Verdict. *Ibid.*

How Embracery is further reſtrained and puniſhed by Statute, *vide* 5 *E.* 3. *cap.* 10. 34 *E.* 3. *c.* 8. 38 *E.* 3. *c.* 12. and 1 *Hawk. P. C.* 260, *&c.*

If a full Jury appear and ſome are challenged off, ſo that the Jury remains for Default of Jurors, the Defaulters ſhall loſe their Iſſues. 4 *H.* 6. 7. Other- Iſſues. Roll. Trial, 631. pl. 1, 4.

6. 7. Otherwise if a Jury be sworn, and one is withdrawn by Consent.

Ibid. pl. 2. But if there be a Joinder of Counties, and a Jury of one County appear, and not of the other; the Defaulters of that County from which enough came, shall not lose their Issues, because the Inquest doth not remain for their Default, but for the Default of them of the other County. 48 *Ass.* 5. *Mes quære.*

Amercement. If the Jurors at the Return of the *Venire facias* make Default, yet they shall not be amerced, because the Parties may be claimed at the first Day, but at the Return of the *Habeas Corpora* they shall. 10 *E.* 4. 19. 1 *E.* 3. 12.

Demand sur Peine. If any of the Jurors appear, the Court may charge them to inquire if any of the other Jurors were within the Town after the Return; and if they find they were, they shall be demanded upon a *Peine*, and if they come not, they shall be amerced. *Roll.* Tit. *Trial*, 632.

Juror fined for departing when he was challenged. A Juror was challenged, and six other Jurors were sworn to try the Challenge, who found him indifferent, and thereupon the Juror was demanded, but did not appear; for which Default he was fined the Value of his Lands for a Year; and the other Jurors inquired of the Value, *&c.* although the other Party then would have challenged him when he was demanded, so that he might have been *treit*; but the Court would not admit this, because then the King would have lost his Fine. 36 *H.* 6. 27.

Juror adjourned upon Pain. If a Juror appear, and is adjourned upon Pain, and makes Default, in this Case, because he shall be fined to the Value of his Land *per Annum*, this shall be inquired by his Companions of the Jury, because the Court knows not the Value of his Land. *Lib.* 8. 41.

A Verdict was taken from the Foreman of the Jury, to which one of them did not aſſent, and Damages aſſeſſed to twenty Shillings, in Treſpaſs and Aſſault; and afterwards, every one of the eleven were fined, for giving their Verdict before they were all agreed. 40 *Aſſize* 10. Fined for giving a Verdict before they were agreed.

Where a Jury are to be fined, a Fine jointly impoſed on them, is not legal, but they muſt be ſeverally fined, becauſe the Offence of one, is not the Offence of another. *Et nemo debet puniri pro alieni delicto.* For then it might be ſaid, *Rutilius fecit, Æmilius plectitur.* Lib. 11. 42. The Fine muſt not be joint.

A Man ſtruck a Juror at *Weſtminſter*, (ſitting in the Court) who paſſed againſt him, and he was thereof indicted and arraigned at the King's Suit, and attainted; his Judgment was That he ſhould go to the *Tower*, and ſtay there in Priſon all Days of his Life, and that his right Hand ſhould be cut off, and his Lands ſeiſed into the King's Hands. 41 *Aſſiſe*, *p.* 25. And now our Juror ſees what Puniſhment it is to ſtrike him in the Face of the Court, let him hold his Hands from others leſt the ſame Judgment light on him. Puniſhment for ſtriking a Juror.

By the Statute of 27 *Eliz. c.* 6. It is enacted, That upon every firſt Writ of *Habeas Corpora* or *Diſtringas*, with a *Niſi Prius*, ten Shillings ſhall be returned as Iſſues, upon every Perſon impanelled, and upon the ſecond Writ, twenty Shillings, and upon the third, thirty Shillings. And upon every Writ that ſhall be farther awarded to try any Iſſue, to double the Iſſues laſt afore ſpecified, until a full Jury be ſworn. Iſſues.

And theſe Iſſues being returned upon a Tenant in Fee-ſimple, in Tail, or for Life of another, or of himſelf, or in the Right of his Wife; the

the Land he then hath will be chargeable for it, and any Man's Cattle upon this Land may be diſtrained for it.

Not ſummoned. But if the Under-Sheriff, *&c.* return a Juror ſummoned, who in Truth was not legally ſummoned, and therefore doth not appear, and ſo loſeth Iſſues, the Under-Sheriff ſhall pay him double the Value of the Iſſues loſt. See the Statutes of *35 H.* 8. 6. and the *2 E.* 6. 32.

And *Note*; The Law hath been ſo careful to puniſh all Offenders, who would endeavour to biaſs and corrupt the Jury; and to puniſh the Juries themſelves, if they receive Money to give their Verdict, or any otherwiſe pre-ingage themſelves to any of the Parties, all which is to the End that a true an honeſt Verdict may be given: What Puniſhment ſhall that Jury have which gives a falſe Verdict?

Such a Puniſhment, that (as I ſaid before) in Civil Cauſes, it is without Example: And ſurely, if the Jurors did bear it in their Minds, their Verdicts would be always grounded upon their Evidence; and not upon their own Intereſt, or any Partiality to either of the Parties.

Wherefore, if the Jurors give a falſe Verdict (which is Perjury of the higheſt Degree) upon an Iſſue joined between the Parties in any Court of Record, and Judgment thereupon, the Party grieved may bring his Writ of Attainr, in the *King's Bench* or *Common Pleas*; upon which twenty-four of the beſt Men in the County are to be Jurors, who are to hear the ſame Evidence which was given to the *Petit* Jury, and as much as can be brought in Affirmance of the Verdict, but no other againſt it. And if theſe twenty-four (who are called the Grand Jury) find it a falſe Verdict; then followeth this terrible and

Attaint.

heavy

heavy Judgment at Common Law upon the *Petit* Jury.

1. That they ſhall loſe *Liberam legem* for ever, that is, they ſhall be ſo infamous, as they ſhall never be received to be a Witneſs, or of any Jury. Judgment in Attaint.

2. That they ſhall forfeit all their Goods and Chattels.

3. That their Lands and Tenements ſhall be taken into the King's Hands.

4. That their Wives and Children ſhall be thrown out of Doors.

5. That their Houſes ſhall be raſed and thrown down.

6. That their Trees ſhall be rooted up.

7. That their Meadow Grounds ſhall be ploughed up.

8. That their Bodies ſhall be caſt into the Gaol, and the Party ſhall be reſtored to all that he loſt, by reaſon of the unjuſt Verdict. So odious is Perjury in this Caſe, in the Eye of the Common Law; and the Severity of this Puniſhment is to this End, *Ut pœna ad paucos, metus ad omnes perveniat*; for there is *Miſericordia puniens*, and there is *Crudelitas parcens*. And ſeeing all Trials of real, perſonal and mixt Actions depend upon the Oath of twelve Men, prudent Antiquity inflicted this ſevere Puniſhment upon them, if they were attainted of Perjury. 1 *Inſt.* 294. *b.*

But now by the Statute of 23 *H.* 8. *cap.* 3. The Severity of this Puniſhment is moderated, if the Writ of Attaint be grounded upon that Statute.

But

But the Party grieved may, at his Election, either bring his Writ of Attaint, at the Common Law, or upon that Statute; wherefore let the Juror expect the greatest Punishment, when he offends. 3 *Inst.* 163, 222.

And so I conclude as to the Jurors, only with the Words of *Fortescue*, *Quis tunc (etsi immemor salutis animæ suæ fuerit) non formidine tantæ pœnæ, & verecundia tantæ infamiæ, veritatem non diceret sic Juratus?*

Who then, though he regard not his Soul's Health, yet for fear of so great Punishment, and for Shame of so great Infamy, would not upon his Oath, declare the Truth?

But as to our Practiser, I would give this one farther Advertisement, which relates also to Jurors.

When a Verdict has been given by a former Jury in the same Cause, and on the same Evidence, it is allowed to give the former Verdict in Evidence, and I have known this introduced by the Counsel, as obliging to the latter Jury to find accordingly; intimating, that otherwise they do (in Effect) perjure the former twelve Men; which may amuse tender Minds, and draw them from the strict Inquiry into the Merits of the Cause, in Favour of their Predecessors; which is a palpable Mistake and Misinformation for these Reasons.

1. The same Evidence in the former Cause and Trial (perhaps) was not so perspicuously delivered as in this.

2. This latter Jury may be of more sagacious and comprehensive Judgment than the former.

3. The

3. The Directions of the Court (which the Jury most heed) may be more clearly delivered to this Jury.

4. The Matter in Contest (perhaps) was not in the former Trial so clearly managed by the Council, being not so well instructed as afterwards.

5. And lastly, supposing the Evidence equally delivered by the Witnesses, apprehended by the Jury, directed by the Court, managed by the Council, yet it is no Perjury or Fault to differ in Judgment; for if twenty-four Jurymen were to try a Matter of Fact, and twelve were of one Opinion, and twelve of another, who is in Fault, while they judge according to the best of their Knowledge and Skill, to which (only) they are sworn? And it is a reasonable Kindness to Jurymen, to make good Constructions of differing Judgments among them, while we see how oft Judges themselves differ in their Opinions, on a Matter stated equally to them all, and that not only as to Matter of Law, but as to Matter of Fact; as attending Practisers may observe in Trials at Bar, in the several Judges several Directions. And this I thought good to advertise, for that I have known Verdicts gained on this unwarrantable Suggestion, against clear and express Evidence, and could instance some Cases: *Sed verbum sat, &c.*

As to the Difference betwixt the Judge and the Jury, and that Question which has made such a Noise, *viz. Whether a Jury is fineable for going against their Evidence in Court, or the Direction of the Judge?* I look upon that Question as dead and buried, since *Bushel*'s Case, in my Lord *Vaughan's Reports* 135; yet some of the Ashes thereof I may sprinkle here without Of-

fence. It doth appear there to have been resolved by all the Judges, upon a full Conference at *Serjeants Inn*, *That a Jury is not fineable for going against their Evidence, where an Attaint lies.* And that it is evident by several Resolutions of all the Judges, *That where an Attaint lies, the Judge cannot fine the Jury for going against their Evidence or Direction of the Court, without other Misdemeanor.*

And where an Attaint doth not lie, as in Criminal Causes upon Indictments, *&c.* my Lord *Vaughan* says these Words, *That the Court could not fine a Jury at the Common Law, where Attaint did not lie, I think to be the clearest Position that ever I considered, either for Authority or Reason of Law.* And one Reason for this (which can never be answered) is, the Judge cannot fully know upon what Evidence the Jury give their Verdict; for they may have other Evidence than what is shewed in Court. They are of the *Vicinage*, the Judge is a Stranger: They may have Evidence from their own personal Knowledge, that the Witnesses speak false, which the Judge knows not of; they may know the Witnesses to be stigmatized and infamous, which may be unknown to the Parties or Court.

And if the Jury know no more than what they heard in Court, and so the Judge knew so much as they, yet they might make different Conclusions, as oftentimes two Judges do; and therefore, as it would be a strange and absurd Thing to punish one Judge for differing with another in Opinion or Judgment; so it would be worse for the Jury, who are Judges of the Fact, to be punished for finding against the Direction of him who is not Judge of the Fact. But he that would be better satisfied in this Point, may read

read that Case, and the Authorities and Reasons given by my Lord *Vaughan*.

It is shewed in that Case, That much of the Office of Jurors, in order to their Verdict, is Ministerial, as not withdrawing from their Fellows after they are sworn; not receiving from either Side Evidence after their Oath, not given in Court; not eating and drinking before their Verdict, refusing to give a Verdict, and the like; wherein if they trangress, they are fineable: But the Verdict itself when given, is not an Act Ministerial but Judicial, and according to the best of their Judgment; for which they are not fineable, nor to be punished but by Attaint.

Nor can any Man shew, that a Jury was ever punished upon an Information either in Law or the Star-Chamber, where the Charge was only, *For finding against their Evidence, or giving an untrue Verdict*, unless Imbracery, Subornation, or the like were joined.

But the *Fining and Imprisoning of Jurors for giving their Verdicts*, hath several Times been declared in Parliament an illegal and arbitrary Innovation, and of dangerous Consequence to the Government, the Lives and Liberties of the People; this celebrated Trial by Juries having been confirmed by many Parliaments. Keb. 2 Part 180. 1 Part 162.

Littleton, Sect. 368. tells us, That as the Jury may find the Matter at large, that is, a Special Verdict, (which the Court cannot refuse, if it be pertinent to the Matter put in Issue) and leave the Law to the Court; so if the Jury will, they may take upon them the Knowledge of the Law upon the Matter, and may give their Verdict generally, as is put in their Charge. As for Example; upon all General Issues, as Not guilty pleaded in Trespass, *Nil debet* in Debt, *Nul* Hardres Rep. 409. 1 Inst. 228.

tort, *Nul disseisin* in Assise, *Ne disturba pas* in *Quare impedit*, *&c.* though it be Matter of Law, whether the Defendant be a Trespasser, a Debtor, Disseisor or Disturber, in the particular Cases in Issue; yet the Jury find not (as in a special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for Plaintiff or Defendant upon the Issue to be tried, wherein they resolve both the Law and the Fact complicately, and not the Fact by itself. And so upon Not guilty to an Indictment of Felony, Breach of the Peace, Trespass, *&c.* and other Cases where the Law and the Fact are complicate and joined, they may determine upon both; yet I must give them my Lord *Coke*'s Caution, which is, That although the Jury, if they will, may take upon them the Knowledge of the Law, and give a general Verdict, yet it is dangerous for them so to do; for if they do mistake the Law, they run into the Danger of an Attaint. Therefore to find the Matter specially, is the safest Way where the Case is doubtful.

And to end, as I began, That *Decantatum* in our Books (as my Lord *Vaughan* calls it) *Ad quæstionem facti non respondent Judices*, *ad quæstionem legis non respondent Juratores*, literally taken, is true; for if it be demanded what is the Fact? the Judge cannot answer it. If it be asked what the Law is in that Case? the Jury cannot answer it. But upon the General Issue, if the Jury be asked the Question, Guilty or not? which includes the Law, they resolve both Law and Fact, in answering Guilty or Not guilty. So as tho' they answer not singly to the Question what is the Law? yet they determine the Law in all Matters where Issue is joined and tried, but where the Verdict is special. But in such Cases

the

the Judge cannot of himself answer or determine one Particle of the Fact, but must leave it to the Jury, with whom let it rest and continue for ever, as the best Kind of Trial in the World for finding out the Truth; and the greatest Safety of the just Prerogatives of the Crown, and the just Liberties of the Subject; and he which desires more for either of them, is an Enemy to both.

Abuses by others, in relation to Juries, are punishable by Fine and Imprisonment; as if a Man assault or threaten a Juror for having given a Verdict against him, he may be indicted as a Disturber of the Administration of Justice, and one who is guilty of a Contempt to the King's Courts. 2 *Hawk. P. C.* 58, 9.

Also the Court of *King's Bench* granted an Information against a Town Clerk, for publishing an Order of the Court against Jurors who had found a Person guilty of Manslaughter only upon an Indictment of Murder, by which Order the said Jurors were declared to be justly suspected of Bribery. *H.* 10 *Ann.* The *Queen* v. *Wakefield.*

CHAP. XIV.

The Learning of General Verdicts, Special Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inquest shall be taken by Default, Inquests of Office, &c. Arrest of Judgment, Variance betwixt the Nar. *and the Verdict, &c.*

Verdict. VERDICT, *(veredictum, quasi dictum Veritatis)* is the Answer of a Jury given to the Court, concerning the Matter of Fact in any Cause committed to their Trial; wherein every one of the twelve Jurors must agree, or it cannot be a *Verdict*. And this is the Foundation upon which the Judgment of the Court is built, for *ex facto jus oritur*; the Law ariseth from the Fact; wherefore it is no Wonder, that the Law hath ever been so curious and cautelous, as not to believe the Matter of Fact, until it is sworn by twelve sufficient Men of the Neighbourhood where the Fact was done, whom the Law supposeth to have most Cognizance of the Truth or Falsehood thereof, which being sworn (for the Words are, *Juratores predict.* dicunt *super sacrum. suum, &c.)* is the *Verdict* whereof we now treat: And such Credit doth the Law give to Verdicts, that no Proof will be admitted to impeach the Verity thereof, so long as the Verdict stands not reversed by Attaint. And therefore upon an Attaint, no *Superfedeas* is grantable by Law. *Pl. Com.* 496.

The Credit of Verdicts.

And

And it is worth our Observation, that the Law seems to take more Care of the Fact, than of herself; for the major Part of the Judges give the Judgment of the Law, though the other Judges dissent. But every one of the twelve Jurors must agree together of the Fact, before there can be a Verdict, which must be delivered by the first Man of the Jury. 29 *Assizes*, *pl.* 27.

General or Special.

Verdicts are either *General* or *Special*.

General Verdict.

A *General Verdict* is that which is brought into the Court in like general Terms to the General Issue; as if a Defendant pleads Not guilty, or no Wrong, then the Issue is general, whether he be Guilty, or the Fact be a Wrong or not; which being committed to the Jury, they, upon Consideration of the Evidence, say for the Plaintiff that the Defendant is guilty of a Wrong, or for the Defendant that it is no Wrong, *&c.* 1 *Inst.* 228.

Special Verdict.

A Special Verdict is where the Jury find the Matter at large, according to the Evidence given, that such a Thing is done by the Defendant; and declaring the Course of the Fact, as in their Opinions it is proved, pray the Judgment of the Court as to what the Law is in such a Case. And as a Special Verdict may be found in Common Pleas, so may it also be found in Pleas of the Crown, or Criminal Causes that concern Life or Member.

The Court cannot refuse it.

And it is to be observed, that the Court cannot refuse a Special Verdict, if it be pertinent to the Matter in Issue. 1 *Inst.* 228.

A Special Verdict may be found upon any Issue, as upon an Alias, &c.

It hath been questioned, whether the Jury could find a Special Verdict, upon a Special Point in Issue, or no, as they might upon the General Issue. But this Question hath been fully

reſolved in many of our Books; firſt in *Plo. Com.* 92. It is reſolved, That the Jury may give a Special Verdict, and find the Matter at large, *en cheſcun iſſue en le monde*, ſo that the Matter found at large, tend only to the Iſſue joined, and contain the Certainty and Verity thereof. *Lib.* 9. 12.

In all Special Verdicts the Judges will not adjudge upon any Matter of Fact, but what the Jury declare to be of their own finding, as upon an Inquiſition or ſuch like found at large in a Special Verdict; for their finding of it, is not an Affirmation that all which is in it, is true.

It is a *certain Rule* in all *Special Verdicts*, That if the Jury find the Point in Iſſue, and only put a Special Doubt to the Court in a Matter of Law, it is a good Verdict; but if they don't find a ſufficient Matter of Fact, to bring Light enough to the Court to reſolve that Doubt; then it is an imperfect Verdict and an immaterial Iſſue, and a *Venire facias de novo* ſhall be awarded.

This Rule is founded on undeniable Authority, and on clear and evident Reaſon, becauſe the Jury are Judges of the Fact, though the Judges are to judge of the Law ariſing on that Fact; and the Jury, in finding the Gift of the Action, have taken upon them to find every Thing neceſſary to make the Defendant guilty, if the Point of the Law be reſolved for the Plaintiff. *Vin. Trial*, 398, 399, 403.

And in 2 *Inſt.* 425. upon Collection of many Authors, it is ſaid, That it hath been reſolved, that in all Actions real, perſonal and mixt, and upon all Iſſues joined, General or Special, the Jury might find the ſpecial Matter of Fact, pertinent and tending only to the Iſſue joined, and thereupon pray the Direction of the Court for the

the Law. And this the Jurors might do at Common Law, not only in Cases between Party and Party, but also in Pleas of the Crown at the King's Suit, which is a Proof of the Common Law And the Statute of *Westminster* the 2. *cap.* 30. is but an Affirmative of the Common Law.

A Freehold upon Condition, without Deed, may be found by Verdict, thought it cannot be pleaded.

And as this Special Verdict is the safest for the Jury, 1 *Inst.* 228. so in many Cases it is most advantageous to the Party, and helps him where his own Pleading cannot. As for Example, saith *Littleton*, Sect. 366, 367, 368. Albeit a Man cannot in any Action plead a Condition, which toucheth and concerns a Freehold, without shewing Writing of this; yet a Man may be aided upon such a Condition, by the Verdict of twelve Men, taken at large in an Assize of *Novel disseisin*, or in any other Action, where the Justices will take the Verdict of twelve Jurors at large: As put the Case, a Man seised of certain Land in Fee, letteth the same Land to another for Term Life, without Deed, upon Condition to render to the Lessor a certain Rent, and for Default of Payment, a Re-entry, *&c.* By Force whereof the Lessee is seised as of Freehold; and after, the Rent is behind, by which the Lessor entreth into the Land, and after the Lessee arraigns an Assize of *Novel disseisin* of the Land against the Lessor, who pleads that he did no Wrong nor *Disseisin*. And upon this an Assize is taken. In this Case, the Recognitors of the Assize may say, and render to the Justices their Verdict at large, upon the whole Matter; as to say, that the Defendant was seised of the Land in his Demesne as of Fee, and so seised let the same Land to the Plaintiff for Term of his Life, rendring to the Lessor such a yearly Rent, payable

payable at ſuch a Feaſt, *&c.* upon ſuch Condition, that if the Rent were behind at any ſuch Feaſt, at which it ought to be paid, then it ſhould be lawful for the Leſſor to enter, *&c.* By Force of which Leaſe the Plaintiff was ſeized in his Demeſne as of Freehold; and that afterwards, the Rent was behind at ſuch a Feaſt, *&c.* By which the Leſſor entred into the Land, upon the Poſſeſſion of the Leſſee. And pray the Diſcretion of the Juſtices, if this be a Diſſeiſin done to the Plaintiff or not. Then, for that it appeareth to the Juſtices, that this was no Diſſeiſin to the Plaintiff, inſomuch as the Entry of the Leſſor was congeable on him, the Juſtices ought to give Judgment, that the Plaintiff ſhall not take any Thing by his Writ of Aſſize; and ſo in ſuch Caſe the Leſſor ſhall be aided, and yet no Writing was ever made of the Condition; for as well as the Jurors may have Conuſance of the Leaſe, they alſo may as well have Conuſance of the Condition, which was declared and rehearſed upon the Leaſe.

Littleton, Sect. 367.

In the ſame Manner it is of a Feoffment in Fee, or a Gift in Tail, upon Condition, although no Writing was ever made of it. And as it is ſaid of a Verdict at large, in an Aſſize, *&c.* in the ſame Manner it is of a Writ of Entry, founded upon a Diſſeiſin, and in all other Actions where the Juſtices will take the Verdict at large, there where ſuch Verdict at large is made, the Manner of the whole Entry is put in Iſſue.

But in Aſſize of Rent, it cannot be found to be upon Condition, unleſs they alſo find the Deed of the Condition. *Roll. Trial,* 690. *P. pl.* 4.

So

So of a Confirmation in Fee to Leſſee for Years. *Ibid. pl.* 5.

Per Hale Chief Juſtice, *Guildhall, Hill.* 1671. A ſpecial Verdict may be found as to Damages in an Action of the Caſe; as the Caſe was there, *viz. Pro Quer'*, and if ſo, *&c.* then ſuch Damages; if ſo, *&c.* then Damages ſuch; and he ſaid, *He had known it ſo done in Debt, and the Damages three Ways.*

Alſo in ſuch Caſe where the Inqueſt may give their Verdict at large, if they will take upon them the Knowledge of the Law upon the Matter, they may give their Verdict generally, as is put in their Charge; as in the Caſe aforeſaid, they may well ſay, that the Leſſor did not diſſeiſe the Leſſee, if they will, *&c.*

General Verdict. Lit. Sect. 368. *Note*; The Court cannot refuſe a general Verdict, if the Jury will find it; it was ſo held before Juſtice *Wyndham*, Lent Aſſizes 1681. in *Verdon*'s Caſe, at *Cambridge*.

In *local Treſpaſſes* the Jury cannot find the Defendant guilty in *another County*; becauſe it is local, but they may find Acts in any other Place in the *ſame* County, for a Jury may thereof have Conuſance: The Finding of *Aſſets* is *not* local, and may be found in a foreign County, even in *Ireland*; for Aſſets is the Subſtance of the Iſſue. Reſignation, Divorce, *&c.* may be found in a foreign County, ſo may a Deed, Leaſe, and Releaſe, or Grant of Rent, *&c.* in one County be found in another where Locality is not *ſpecially* put in Iſſue, or where the Place is not material, but is only put for the Venue. *Vin. Trial.* 379, 380.

The Jury may likewiſe find Eſtoppel, which cannot be pleaded, as in the ſecond Report, f. 4. it well appears, where one *Goddard*, Adminiſtrator

ſtrator of *James Newton*, brought an Action of Debt againſt *John Denton*, upon an Obligation made to the Inteſtate, bearing Date the 4th Day of *April*, *Annò* 24 *Eliz.* The Defendant pleaded, that the Inteſtate died before the Date of the Obligation, and ſo concluded, that the ſaid *Eſcript* was not his Deed; upon which they were at Iſſue.

And the Jury found, that the Defendant delivered it as his Deed, *July* 30 *Anno* 23 *Eliz.* and found the Tenor of the Deed *in hæc verba*, *Noverint Univerſi*, *&c. Dat.* 4 *Aprilis Anno* 24 *Eliz.* And that the Defendant was alive 30 *July Anno* 23 *Eliz.* And that he died before the ſaid Date of the Obligation, and prayed Conſideration of the Court, if this was the Defendant's Deed: And it was adjudged by *Anderſon* Chief Juſtice, *Windham*, *Periam* and *Walmſley*, that this was his Deed; and the Reaſon of the Judgment was, that although the Obligee in pleading cannot alledge the Delivery before the Date, as it is adjudged in 12 *H.* 6. 1. which Caſe was affirmed to be good Law, becauſe he is eſtopped to take an Averment againſt any Thing expreſſed in the Deed; yet the Jurors, who are ſworn *ad veritatem dicend.* ſhall not be eſtopped. For an Eſtoppel is to be concluded to ſpeak the Truth, and therefore Jurors cannot be eſtopped, becauſe they are ſworn to ſpeak the Truth.

Note; That a Deed may be pleaded to be delivered after the Date, not before, becauſe it ſhall not be intended written before the Date, which may be after the Date, 12 *H.* 6. 1. As in Waſte ſuppoſed in *A.* to plead that *A.* is a Hamlet in *B.* and not a Town of itſelf, admitteth the Waſte, *&c.* 9 *H.* 6. 66. and the Jury cannot find No Waſte, for that would be againſt the Record.

Eſtoppel, 1 Cro. 110. Lib. 4. 53.

But if the Eſtoppel, or Admittance, be within the ſame Record in which the Iſſue is joined,

joined, upon which the Jurors give their Verdict, there they cannot find any Thing againſt this, which the Parties have affirmed and admitted of Record, although it be not true; for the Court may give Judgment upon a Thing confeſſed by the Parties, and the Jurors are not to be charged with any ſuch Thing, but only with Things in which the Parties vary. 2 *Coke* 4.

So Eſtoppels which bind the Intereſt of the Land, as the taking of a Leaſe of a Man's own Land by Deed indented, and the like, being ſpecially found by the Jury, the Court ought to judge, according to the ſpecial Matter; for albeit Eſtoppels regularly muſt be pleaded and relied upon, by apt Concluſion, and the Jury is ſworn *ad veritatem dicend.* yet when they find *veritatem facti*, they purſue well their Oath, and the Court ought to judge according to Law. So may the Jury find a Warranty being given in Evidence, though it be not pleaded, becauſe it bindeth the Right, unleſs it be in a Writ of Right, when the Miſe is joined upon the meer Right. 1 *Inſt.* 227. 1 Inſt. 227. *a.* Warranty not pleaded.

Verdicts ought to be ſuch, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding Matter incertainly, or ambiguouſly, are inſufficient and void, and no Judgment ſhall be given thereupon. As if an Executor plead *Plene Adminiſtravit*, and Iſſue is joined thereon, and the Jury find that the Defendant hath Goods within his Hands to be adminiſtred, but find not to what Value, this is an Uncertainty, and therefore an inſufficient Verdict. *Lib.* 9. 74. 1 *Inſt.* 227. Uncertain Verdicts.

In all ſpecial Verdicts, the Judges will not adjudge of any Matter of Fact, but this which Special Verdict.

the

the Jury declare to be true of their own finding. And therefore the Judges will not adjudge upon an Inquisition, or *aliquid Tale* found at large in a special Verdict, for their finding of this is not an Affirmation, that all which is in this is true. *Siderf.* 2 Part 86.

The Office of the Jury.

It is the Office of the Jurors to shew the Verity of the Fact, and leave the Judgment of the Law to the Court. And therefore, upon an Indictment of Murder, *Quod felonice percussit, &c.* If the Jury find *percussit tantum*, yet the Verdict is good; for the Judges of the Court are to resolve upon the Special Matter, whether it was *felonice*, and so Murder, or not, *Lib.* 9. 69. And if the Court adjudge it Murder, then the Jurors, in the Conclusion of their Verdict, find the Felon guilty of the Murder contained in the Indictment.

A Jury may take Conusance of a Deed *without Date*, and made before Time of Memory, and find it if they will, though they are not bound to do it.

Intention.

The Jury cannot determine the *Intention* in Deeds or Wills; this belongs to the Court, who is to construe by the Rules of Law: But what is, or is not, *an Intent* to do a Thing within an Act of Parliament, this a Jury is to determine because the *Intent* is to be collected from Facts and Circumstances of which they are the proper Judges.

Matter of *Record* may be found by a Verdict at large, but the Jury are not compellable to find it; Recovery hath been found by Verdict without shewing of it under Seal; as also a Fine not pleaded or given in Evidence. So a *Note of a Fine*, or a Recovery without the Record itself, *sub pede sigilli*, or the Number Roll may be given

given in Evidence, if the Jury will accept of it. Indeed these ought either *to be pleaded*, and made Part of the Record to be tried, or else given in Evidence *sub pede sigilli*, and then the Jury are bound to take Conusance of them. *Vin. Trial*, 384, 385.

A Verdict that finds Part of the Issue, and finding nothing for the rest, is insufficient for the whole, because they have not tried the whole Issue wherewith they are charged: As if an Information of Intrusion be brought against one, for intruding into a Messuage and an hundred Acres of Land: Upon the General Issue, the Jury find against the Defendant for the Land, but say nothing for the House; this is insufficient for the whole.

Verdict finding Part of the Issue. 1 Inst. 127. Moor 406.

But if the Jury give a Verdict of the whole Issue, and of more, *&c.* that which is more is Surplusage, and shall not stay Judgment: For *Utile per inutile non vitiatur*. *Leon.* 1 Part 66. *Cro.* 1 Part 130. But necessary Incidents required by Law, the Jury may find. *Siderfin* 232.

Finding more than the Issue. 1 Inst. 227. Where fatal, Sid. 96. Keb. 1 Part 289.

If the Issue be upon a Descent, and the Jury find the same, and a continual Claim, that as to the continual Claim is Surplusage. 7 *H.* 6. 8, 9, 10.

An Action of the Case on Deceit was brought, for that he sold unto the Plaintiff two Oxen, and warranted them to be sound; on not guilty, the Jury found him Guilty as to one, and Not guilty as to the other; and good; for that the Action was founded not on the Contract, but the Deceit. 3 *Cro.* 884. *Gravenor* and *Mete*.

In Debt the Plaintiff declares, that he had Judgment against Baron and Feme for a Debt of

of the Wife's, *dum ſola, &c.* that they were in Execution, and ſuffered to eſcape; the Jury found the Huſband only in Execution, and eſcaped, and Judgment for the Plaintiff. *Roberts* verſus *Herbert*, *Hill.* 12 *Car.* 2. *C. B.* 1 *Sid.* 5.

Plaintiff where barred though Verdict for him.

In ſome Caſes the Verdict may be found for the Plaintiff, and yet he may be barred.

As 40 *Aſſ.* 6. in a *Mortdanceſtor*, all the Points of the Writ found for the Plaintiff, and yet he was barred for this Reaſon; for although he was Heir to his Father, yet becauſe the elder Brother by the Half Blood did enter, he was barred.

Where the Verdict ought to be of more than is in the Iſſue.

Yet in many Caſes, nay almoſt in all, the Jury ought to find more than is put in Iſſue, otherwiſe their Verdict is not good; and therefore they are to aſſeſs Damages and Coſts, becauſe it is Parcel of their Charge, as a Conſequent upon the Iſſue, though it be not Part of the Iſſue *in Terminis*. *Lib.* 10. 119.

A Verdict muſt be ſufficient in Matter and Form, be the ſame Special or General, and therefore they muſt find Damages and Coſts where the ſame ought to be found.

Damages by the firſt Inqueſt.

So in Treſpaſs againſt two, one comes and pleads Not guilty, and is found Guilty. In this Caſe, the firſt Inqueſt ſhall aſſeſs Damages for the whole Treſpaſs, by both Defendants; and afterwards the other comes and pleads Not guilty, and is found Guilty: The finding of Damages by the firſt Inqueſt, to which he was not Party, ſhall bind him; and therefore if the Damages are outrageous and exceſſive, the Defendant in the laſt Inqueſt ſhall have an Attaint. *Lib.* 10. 119.

Attaint.

So

So in Treſpaſs, *Quare clauſum fregit*, if Iſſue be joined upon a Feoffment, and the Jury give outrageous Damages, an Attaint lies; for the Inquiry of Damages is conſequent and dependent upon the Iſſue, and Parcel of their Charge. *Ibid.*

In the 11th Report, fol. 5. It was reſolved, That in Treſpaſs againſt two, where one comes and appears, *&c.* againſt whom the Plaintiff declares with a *ſimul cum*, *&c.* who pleads, and is found Guilty, and Damages aſſeſſed by the Inqueſt, and afterwards the other comes and pleads, and is found Guilty; the Defendant which pleaded laſt ſhall be charged with the Damages taxed by the firſt Inqueſt; for the Treſpaſs which the Plaintiff had made joint by his Writ and Count, and done at one Time, cannot be ſevered by the Jurors, if they find the Treſpaſs to be done by all, at one and the ſame Time as the Plaintiff declared. Damages by the firſt Inqueſt.

So in Treſpaſs againſt divers Defendants, if they plead Not guilty, or ſeveral Pleas, and the Jury find for the Plaintiff in all, the Jurors cannot aſſeſs ſeveral Damages againſt the Defendants, becauſe all is but one Treſpaſs, and made joint by the Plaintiff, by his Writ and Count. And although that one of them was more malicious, and *de facto* did more and greater Wrong than the others, yet all came to do an unlawful Act, and were of one Party, ſo that the Act of one is the Act of all of the ſame Party being preſent. But in Treſpaſs againſt two, if the Jurors find one Guilty at one Time, and the other at another Time, there ſeveral Damages may be taxed. But if the Plaintiff bring an Action of Treſpaſs againſt two, Several Damages. *Vide Devant, cap.* 4. 11 Coke 5.

and declare upon a ſeveral Treſpaſs, his Action ſhall abate. And this is the Diverſity between the finding of the Jury, and the Confeſſion of the Party.

Ibid. 7. And in Treſpaſs, where the Defendants plead ſeveral Pleas, all triable by one Jury, and they find generally for the Plaintiff, the Jurors cannot ſever the Damages; if they do, their Verdict is vicious.

Detinue. If the Declaration be on ſeveral Damages, touching every Part in ſeveral, the Verdict ought to find the Damage ſeveral, as the Declaration is.

Waſte. So in Waſte, for every ſeveral Parcel.

Præmunire. So in a *Præmunire*, againſt the Principal and Acceſſary.

Forcible Entry. So in a forcible Entry, where ſome are found to detain forcibly, and others to enter forcibly.

Treſpaſs. If one be found Guilty of ſeveral Treſpaſſes, the Damages may be intire.

Jeofail. If one of the Iſſues be a Jeofail, and the Damages intirely aſſeſſed, 'tis ill in both.

Coſt. But Coſt in theſe Caſes muſt be intire.

Judgment *de melioribus dampnis.* But in Treſpaſs againſt two, where one appears and pleads Not guilty to a Declaration againſt him, with a *Simul cum, &c.* and afterwards the other appears, and pleads Not guilty to a Declaration againſt him alſo, with a *Simul cum, &c.* Whereupon two *Venire fac.* iſſue out, and one Iſſue tried after the other, and ſeveral Damages aſſeſſed; In Judgment of the Law, the ſeveral Juries give one Verdict, all at one Time, and the Plaintiff hath his Election to have Judgment *de melioribus dampnis*, by either of the Inqueſts. And this ſhall bind all, but *fiat niſi una Executio.*

It

It is a Maxim, That in every Caſe where an Inqueſt is taken by the Miſe of the Parties, by the ſame Inqueſt ſhall Damages be taxed by all. And in *Mich.* 39 *H.* 6. *fol.* 1. in an Action of Treſpaſs againſt many, (who pleaded in Bar the Term before) and one of them made Default, which was recorded: There it is reſolved by all the Court, That for ſaving of a Diſcontinuance, a Writ of Inquiry of Damages ſhall be awarded, but none ſhall iſſue out, becauſe he ſhall be contributory to the Damages taxed by the Inqueſt, at the Miſe of the Parties, if it be found for the Plaintiff: And if it be found againſt the Plaintiff, then the Writ of Enquiry ſhall iſſue forth. Damages. 11 Coke 6. Writ of Inquiry.

And the Reaſon wherefore no Writ ſhall iſſue out at firſt, to inquire of Damages, until, *&c.* is, becauſe that if a Writ ſhould iſſue out, and be executed, this is nothing but an Inqueſt of Office, and not at the Miſe of the Parties; and yet this Inquiry (if it might be allowed) ought to ſerve for all the Damages; for Inquiry of Damages ſhall not be twice, and the others which have pleaded to the Inqueſt, if the Iſſue be found againſt them, ſhall be chargeable to thoſe Damages which are found by the Inqueſt of Office, and if they be exceſſive they ſhall have no Remedy, although there be no Default in them: For they cannot have an Attaint, becauſe it is but an Inqueſt of Office. *Ibid.*

So in Treſpaſs of *Aſſumpſit* againſt two, if one confeſs the Action, or let it go by *Nil dic.* and the other plead, the Jury upon the Iſſue ſhall aſſeſs the Damages againſt both. *Keb.* 1 Part 623.

Damages by the first Inquest. 11 Co. 5.

But in Trespass against two, who plead Not guilty, &c. severally; and several *Venire facias* awarded, the Inquest which first passes, shall assess Damages for all, and the second Inquest ought not to assess Damages at all, but that the Defendant shall be contributory to the Damages assessed by the first Jury, notwithstanding he is not Party to it; yet if these Damages be excessive, he shall have an Attaint, because, though he is a Stranger to the Issue, yet in Law he is privy in Charge. And so no Damage or Mischief can accrue to him in this Case.

Verdict, when to be supplied by Writ of Inquiry, &c. Fish. [illegible]

Now let us see, when something is left out of the Verdict, which the Jury ought to have inquired, whether it may be supplied by Matter *ex post facto*; and how; And for this, know, That if Damages be left out of a Verdict, this Omission cannot be supplied by Writ of Inquiry of Damages; for this would prevent the Defendant of his Remedy by Attaint, which would be very mischievous; for then such Omission might be on Purpose to deprive the Plaintiff of his Attaint. *Lib.* [illegible]

And the Rule is, That when the Court *ex Officio* ought to inquire of any Thing, upon which no Attaint lies, there the Omission of this may be supplied by a Writ of Inquiry of Damages; as in a *Quare Impedit*, if the Jury omit to inquire of these four Things, that is to say, *de plenitudine, ex cujus præsentatione, si tempus semper transierit*, and the Value of the Church per *Annum*, there the Plaintiff may have a Writ to inquire of these Points. *Dyer* [illegible], [illegible] because of these no Attaint lies, as it is [illegible] in [illegible] because that as to these, the Inquest is but of Office. But in all Cases, where

where any Point is omitted, whereof an Attaint lieth, there this shall not be supplied by a Writ of Inquiry, upon which no Attaint lieth. And therefore in Detinue, if the Jury find Damages and Cost, and no Value, as they ought, this shall not be supplied by Writ of Inquiry of Damages, for the Reason aforesaid. *Et sic in similibus. Ibid.* Keb. 1 Part 882.

The Plaintiff was nonsuit. And upon the Statute 17 *Car.* 2. 7. the Jury inquired of the Value of the Cattle, *scil.* 55. *l.* and *da.* 12 *d.* But they did not inquire what Rent was arrear: And it was moved to supply it by a new Writ of Inquiry, as in a *Quare Impedit*; but it was answered, that the Statute says, in Case of a Nonsuit, the same Jury shall inquire of the Value of the Cattle, and the Rent arrear. *Sid.* 480. *Keb.* 2 Part 409. In Replevin.

A Verdict upon an Issue of Misnomer, pleaded in Abatement, is peremptory; and if the Jury omit to find Costs, they cannot be supplied by a Writ of Inquiry, *&c.* *Keb.* 2 Part 545. Abatement. Costs.

But how then? What, shall the Plaintiff lose the Benefit of his Verdict, because the Jury assessed no Damages, or did insufficiently assess them? Certainly in such Cases where Damages are only to be recovered, he must lose the whole Benefit of his Verdict; but where any Thing else is to be recovered besides Damages, as in Debt, Ejectment, *&c.* he may release his Damages, and have Judgment upon his Verdict as to the rest. And so where Damages are to be recovered, if Part of them are assessed insufficiently, and Part well, he may have Judgment for those Damages well assessed. And oftentimes Verdict set aside, because the Damages not well assessed. Release Damages. Carter's Rep. 51.

Verdict set aside in Part, for Insufficiency in the Declaration.

times the Insufficiency of the Declaration shall set aside the Verdict; as if an Action upon the Case be brought upon two Promises, and one of them be insufficiently laid, and the Verdict give intire Damages, this is naught for the whole; but if the Damages had been severally assessed upon the several Promises, then the Verdict as to the Promise well laid should have stood. *Litt. Rep.* 6. 2 *Keb.* 488.

Releasé of Damages where none were assessed.

In the 11th *Report*, *f.* 56. *Marsh* brought a Writ of Annuity against *Bentham*, and the Parties descended to Issue, which was tried for the Plaintiff, and the Arrearages found, *&c.* But the Jurors did not assess any Damages or Costs; which Verdict was insufficient, and could not be supplied by Writ of Inquiry of Damages: Wherefore the Plaintiff released his Damages and Costs, and upon this had Judgment; upon which the Defendant brought a Writ of Error, and assigned the Error aforesaid, *scil.* the Insufficiency of the Verdict; *sed Judicium affirmatur*, because the Plaintiff had released his Damages and Costs, which is for the Benefit of the Defendant.

In *Detinue* of Charters, on *Non detinet*, Verdict for the Plaintiff, and Damages, but the Jury did not find the Value of the Deeds, and a Writ of Inquiry was awarded to that Purpose, and returned, and ruled good; and by *Twisden* Justice, Debt against Executor, who pleads *Plene*, *&c.* and it is found against him, and the Jury gave no Damages, that cannot be aided by Writ of Inquiry. *Burton* versus *Robinson*, *Pasch.* 17 *Car.* 2. *B. R.*

1 Sid. 246. Releasé of Damages where they were not well assessed.

In *Dyer*, 22 *Eliz.* 369, 370. in a Writ of *Ejectione Custodiæ terræ & hæredis*, the Jurors assessed Damages intirely, which was insuffi-

cient,

cient, for it lay not for the Heir; yet the Plaintiff released his Damages, and had Judgment for the Land: And *Note*, That insufficient Assessment of Damages, and no Assessing is all one.

Damages and Costs.

The Jury ought to assess no more Damages *pro injuria illata*, than the Plaintiff declares for; but they may assess so much, and more-over give Costs, which is called *Expensæ litis*; tho' in the proper and general Signification *Dampnum* also comprehends Costs of Suit, as the Entry, reciting both Damages and Costs, well affirms, *scil. Quæ dampna in toto se attingunt ad, &c.*

More Damages than the Plaintiff declares for.

But if the Jury do assess more Damages than the Plaintiff declares for, the Plaintiff may remit the Overplus, and pray Judgment for the Residue, as in the 10th Report, *f.* 115. In Trespass, the Plaintiff declared *ad dampnum, &c.* 40 *l.* At the Trial the Jury assessed Damages *occasione transgressionis prædict' ad* 49 *l.* And for Costs of Suit 20 *s.* Upon which Verdict the Plaintiff, at the Day in Bank, remitted 9 *l.* Parcel of the said 49 *l.* assessed for Damages, and prayed Judgment for 40 *l.* (so which Damage he had counted) with Increase of Costs of Suit, and had 9 *l. de Incremento* added by the Court, which in all amounted to 50 *l.* and had his Judgment accordingly; upon which a Writ of Error was brought, and the Judgment affirmed.

Damages remitted.

Ibid. 117.

For as in real Actions, the Demandant shall not count to Damages, *&c.* because it is incertain to what Sum the Damages will amount, by reason he is to recover Damages *pendant le Brief*; so in the Case of Costs, he shall recover

ver for the Expences depending the Suit, which being uncertain cannot be comprehended in the Count, becauſe the Count extends to Damages paſt, and not to Expences of Suit. For in perſonal Actions he counts to Damages, becauſe he ſhall recover Damages only for the Wrong done, before the Writ brought, and ſhall not recover Damages for any Thing *pendant le Brief.* But in real Actions, the Demandant never counts to Damages, becauſe he is to recover Damages alſo, *pendant le Brief*, which are incertain.

Damages in real and perſonal Actions.

Damages and Coſts intirely aſſeſſed.

The Jury may, if they will, aſſeſs the Damages and Coſts intirely together, without making any Diſtinction, 18 *E.* 4. 23. But then they muſt not aſſeſs more Damages and Coſts than the Damages are which the Plaintiff counts to, for if they do, the Plaintiff ſhall recover only ſo much as he hath declared for, without any Increaſe of Coſts, becauſe the Court cannot diſtinguiſh how much they intended for Coſt, and how much for Damage.

10 Coke 117.

As in 13 *H.* 7. 16, 17. one *Darrel* brought a Writ of Treſpaſs, and counted to his Damage twenty Marks; the Defendant pleaded Not guilty, and the Jury taxed the Damages and Coſts of Suit jointly to twenty-two Marks, and the Verdict was held to be good for twenty Marks, and void for the Reſidue, becauſe it doth not appear how much was intended for Damages, and how much for Coſts; ſo that there may be more Damages than the Plaintiff declared for, or leſs, and ſo the Court knows not how to increaſe the Coſt; wherefore he ſhall have Judgment but for twenty Marks, by reaſon of the Incertainty.

Verdict amended by the Notes.

Where a ſpecial Verdict is not entered according to the Notes, the Record may be

amended and made agree with the Notes at any Time, though it be three or four, *&c.* Terms after it is entered. *Lib.* 4. 52. *lib.* 8. 162. *Cro.* 1 Part 145.

In the Case of *Turnor* and *Thalgate*, *Mich.* 1658. *B. R.* it was said *per Curiam*, That special Verdicts may be amended by the Notes, but the Notes cannot be amended or enlarged by any Averment or *Affidavit*, for that were to find a Verdict by the Court. Yet in that Case, where the Notes were, That the Judgment, *&c.* was vacated *prout per Rule*, the Verdict was amended, vacated *per Curiam prout per Rule*; for so much is implied in the Notes. Notes. See Keb. 1 Part 504, 907.

See a Verdict amended by the Notes after Judgment, and Error brought. 1 *Roll. Rep.* 82.

If the Matter and Substance of the Issue be found, it is sufficient, for precise Forms are not required by Law in special Verdicts, (which are the finding of Laymen) as in Pleadings which are made by Men learned in the Law, and therefore Intendment in many Cases shall help a special Verdict, as much as a Testament, Arbitrament, *&c.* And therefore though he which makes a Deputy ought to do it by *Escript*; yet when the Jury find generally, that *A.* was Deputy to *B.* all necessary Incidents are found by this; and upon the Matter they find, that he was made Deputy by Deed, because it doth tantamount. *Lib.* 9. 51. And in the fifth Report, *Goodal*'s Case, it was resolved, That no Matters in a special Verdict shall be intended and supplied, but only that which the Jury refer to the Consideration of the Court. Form. Hob. 54.

In all Cases where the Jury find the Matter committed to their Charge at large, and overmore conclude against Law, the Verdict is good,

and

Ill Conclusion. Moor 105, 269. Litt. Rep. 135, 94, 106.

and the Conclusion ill. *Lib.* 4. 42. And the Judges of the Law will give Judgment upon the special Matter according to the Law, without having Regard to the Conclusion of the Jury, who ought not to take upon them Judgment of the Law. *Lib.* 10. 11.

Upon every *General Issue*, if the Jury are in Doubt, they may give their Verdict at large, and leave the Matter to the Discretion of the Court; but it is otherwise on a *Special Issue.*

Though the Jury may take upon them the Knowledge of the Law, and give a *general Verdict*, yet it is not prudent for them so to do; for if they mistake the Law, they run into the Danger of an Attaint; 'tis therefore the safest Way, where the Case is doubtful, for them to find the *special Matter.*

A special Verdict cannot be given in any Action but where the Issue is joined upon the *General Issue*, and not where it is joined on the *special Matter* with an *absque hoc*, *&c.* Yet *Coke*, 1 *Inst.* 227. *b.* tells us a special Verdict, or a Verdict at large, may be given in *any Action*, and *upon any Issue*, whether general or special, and that the Law is now settled in this Point. *Vin. Trial*, 399.

A Verdict may be taken by *reasonable Intendment* where it stands upright and nothing in the Verdict to impugn it; but where they find a meer Matter of Fact, as Livery at such a Day, this shall not be taken by Intendment one way or the other.

After a Verdict the Court will admit any Intendment to make the Case good, and all Surplusage will be rejected, and no Prejudice admitted. See 2 Ld. *Raym.* 860, 865.

In a ſpecial Verdict, whereby any Man is to be charged or hurt, or convicted, though the Jury find *Matter of Evidence* enough for them to find the Fact, and give a Verdict againſt him; yet, if they do not find the Fact, *ſuch* Matter, though pregnant Evidence, will not warrant the Judge to *intend* the Fact or convict the Party.

After a Verdict it may be *intended*, That no Damages were given for Matter *inſenſible*; but of *ſenſible* Matter it cannot be ſo intended, tho' it may be inſufficient in Law. *Ibm.* 405, 406, 407.

Whereſoever a Jury begins with a *ſpecial Matter*, with a *general* Concluſion upon it, *contrary* to what the Law and Court judge upon the *ſpecial* finding; or, when they begin with a direct Verdict, and after deduce *ſpecial Matter*, *contrary* to their direct Verdict, and cloſe with ſubmitting the whole to the Court; in either Caſe, the *ſpecial Matter* makes the Verdict and over-rules the *general*. *Ibm.* 413.

Where the Declaration in Treſpaſs is, *Cum aliquibus averiis*, of a Number uncertain, and the Verdict is as general as the Declaration, *Cum aliquibus averiis*, there the verdict is good. *Cro.* 2 Part 662. As general as the Nar.

In *Ejectione firmæ*, where the Plaintiff declared of a Meſſuage and three hundred Acres of Paſture in *D. per Nomina* of the Manor of *Monkhal*, and five Cloſes *per Nomina*, *&c.* Upon Not guilty, the Jury gave a ſpecial Verdict, *viz.* *Quoad* four Cloſes of Paſture, containing by Eſtimation two thouſand Acres of Paſture, that the Defendant was not guilty, *Quoad reſiduum* they found Matter in Law. And it was moved by *Yelverton*, that this Verdict *Quoad reſiduum*, incertain.

Verdict was imperfect in all: For when the Jury find that the Defendant was not guilty of four Closes of Pasture, containing by Estimation two thousand Acres of Pasture, it is incertain, and doth not appear of how much they acquit him. And then, when they find *Quoad residuum* the special Matter, it is uncertain what the Residue is, so there cannot be any Judgment given; and of that Opinion was all the Court, wherefore they awarded a *Venire facias de novo*, to try that Issue. *Cro.* 2 Part 113.

Quoad residuum.

Ejectione firmæ of thirty Acres of Land in *D.* and *S.* The Defendant was found guilty of ten Acres, and *Quoad residuum* Not guilty; and it was moved in Arrest of Judgment, that it is uncertain in which of the Vills this Land lay, and therefore no Judgment can be given: *Sed non allocatur*; and it was adjudged for the Plaintiff, for the Sheriff shall take his Information from the Party, for what ten Acres the Verdict was. *Cro.* last Part 465. *diversitas apparet.*

Circumstances.

Where the Jury find Circumstances upon an Evidence given, to incite them to find Fraud, *&c.* yet the same is not sufficient Matter upon which the Court can judge the same to be Fraud, *&c. Brownlow's* 2 Part 187. Yet in many Cases the Jury may find Circumstances and Presumptions, upon which the Court ought to judge. As to find that the Husband delivered Goods devised by the Wife. Upon this the Court adjudged that the Husband assented to the Devise at first.

Moor 192. Cart. Rep. 16.

Postea amended, how.

Where a Verdict is certainly given at the Trial, and uncertainly returned by the Clerk of the Assizes, *&c.* The *Postea* may be amended,

ed, upon the Judge's certifying the Truth how the verdict was given. 1 *Cro.* 338. See *Keb.* 2 Part 875. Where the Court would not compel the bringing in the *Poſtea.* 1 Part 346.

In many Caſes a Verdict may make an ill Plea or Iſſue good. As in an Action for Words *Thou wast perjured, and haſt much to anſwer for it before God.* Exception after Verdict for the Plaintiff, in Arreſt of Judgment: For that it is not laid in the Declaration, that he ſpake the Words *auditu quamplurimorum*, or of any one, according to the uſual Form: *Sed non allocatur*; for being found by the Verdict that he ſpake them, it is not material, although he doth not ſay *in auditu plurimorum*; whereupon it was adjudged for the Plaintiff. *Cro.* 1 Part 199. So want of a Day in the Nar. made good by Verdict. *Keb.* 2 Part 354.

Ill Plea made good by Verdict. 2 Keb. 362.

See *Cro.* laſt Part 116. where the Bar was ill, becauſe no Place of Payment was alledged, yet the Payment being found by Verdict, it was adjudged well enough, for a Payment in one Place, is a Payment in all Places. *Keb.* 1 Part 662, 771, 786, 793. *Sid.* 306, 290, 341, 342, 379. *Litt. Rep.* 184, 200, *&c. Mod. Rep.* 42, 43. *Hard. Rep.* 42, 43.

In an Action of the Caſe for Continuance of a Wall, by which the Plaintiff's Lights were ſtopped in an ancient Houſe. *Per Cur':* The Plaintiff ought to ſhew the Wall was new, and is not helped by Verdict. *Keb.* 1 Part 584.

Not guilty is a good Plea after Verdict in *Aſſumpſit*; ſo on *Non Aſſumpſit* the Jury may find the Defendant guilty. *Keb.* 1 Part 795.

In

In an Action *sur Assumpsit*, laid twenty Years since, *& non cul. infra sex annos, & replic. infra sex annos*, which is a Departure, yet the Verdict helps it. *Keb.* 1 Part 566.

In pleading *Riens avoit Jour del brief*, and said not *Ne unque puis*, and the Jury find it, it is helped by the Verdict.

But *Drake* said, the same after Verdict was helped by the Statute of *Jeofails*.

The like 22 *E.* 4. 46. *Que le Baron ne fait seisie que Dower Jour del Espousal, &c.*

So if an Executor plead *Riens enter mains jour del brief, &c.* and omit *Ne unque puis.* 5 *H.* 7. 14.

Debt *versus* Heir.

Debt brought upon a Bond against an Heir in the *Detinet* only, and upon *Riens per Discent* there was a Verdict for the Plaintiff; it is naught upon a Demurrer, but after Verdict is aided by the Statute 16 & 17 *Car.* 2. *cap.* 8. which is (after several Matters of Substance) thereby enacted to be amended after Verdict, and other Matters of like Nature, not being against the Right of the Matter in Suit, *&c.* shall not stay Judgment. *Sid.* 342. *Keb.* 1 Part 259, 278, 309, 470. 1 Part 662, 771.

An Indictment of Extortion against a Bailiff, *quod colore officii extorsive & injuriose* he took Money, and sheweth not the Particulars; good *per Curiam*, especially after Verdict. *Keb.* 1 Part 357.

A Repleader was denied. Keb. 1 Part 498, 829,

Way.

In an information for not repairing a Highway in their Parish. Upon *Non debent reparare*, the Verdict found so, for the Defendant. The Court held the Issue ill, because 'tis contrary to Law; the Way being in their own Parish, they ought to have shewed who ought to repair; and if the Verdict had found that

that the Defendant ought to repair, it had been well enough; however after Verdict the Court gave Judgment, that the Defendant should be acquitted.

Trespass by Baron and Feme *de clauso fracto* of the Baron's, and for the Battery of the Feme, *ad dampnum ipsorum.* The Defendant *Quoad* the *clausum fregit* pleaded Not guilty, *Quoad* the Battery justifies. And for the first Issue, it was found for the Defendant; and for the second, for the Plaintiff, and now moved in Arrest of Judgment, That the Declaration is not good, because the Baron joins the Feme with him in Trespass *de clauso fracto* of the Baron, which ought not to be; but for the Battery of the Feme they may join, whereto all the Court agreed; but it was moved, That in Regard it was found against the Plaintiffs for this Issue, in which they ought not to join, and the Defendant is thereof acquitted, and the Issue is found against the Defendant, for that Part wherein they ought to join; this Verdict has discharged the Declaration for that Part which is ill, and is good for the Residue. As in 9 *E.* 4. 51. Trespass by Baron and Feme, for the Battery of both: The Defendant pleaded Not guilty, and found Guilty, and Damages assessed for the Battery of the Baron, by itself, and for the Battery of the Feme, by itself; and Judgment was given for the Damages for the Battery of the Feme; and the Writ abated for the Residue. And of that opinion was *Lea*, Chief Justice, and *Dodridge*, but *Houghton* and *Chamberlaine contra.* For the Declaration being ill in itself in Substance, the Verdict shall never make it good. Adjourned. 2 *Cro.* 655.

Baron and Feme. *Vide* Keb. 1 Part 944. Count against Baron and Feme, of Trespass done *cum averiis suis*, after Verdict allowed good. 946.

Rocbel

Rochel and his Wife againſt *Steel.*

Rochel and his Wife brought an Action of Treſpaſs and Aſſault in the *Exchequer*, *Hill.* 1659. againſt *Steel* and others, for beating the Huſband and Wife; who pleaded Not guilty, and the Verdict found *Steel* Guilty of the Battery of the Wife, but found nothing concerning the Huſband; wherefore Judgment was ſtayed; but the Barons held, That if the Jury had found the Defendant Not guilty, as to the Huſband, then the Verdict had helped the Declaration, and the Plaintiff ſhould have had Judgment for the Damages for the Battery of the Wife. *Hardreſs* 166.

Horton and his Wife declared in Treſpaſs for beating the Wife, *ad dampnum ipſorum*, and good. *Siderfin* 387.

Of what a Verdict may be. Plo. Com. 411.

The Jury may find any Thing that may be given in Evidence to them, as Records, either Patent, Statute, or Judgment, Things done in another County or Country; for which ſee Evidence before, *Hob.* 227. And of thoſe Things they ought to have Conuſance; they

Incidents.

are to have Conuſance alſo of all Incidents and Dependants thereupon; for an Incident is a Thing neceſſarily depending upon another. *Co. Lit.* 227. *b.*

How conſtrued.

If the Verdict may any ways be conſtrued good, a conſtruction to deſtroy it ought not to be made. *Carter*'s Rep. 80, 94.

Outlaw.

If one of the Jury be outlawed when the Verdict is found, the Verdict is not good, but may be reverſed by Error.

In a ſpecial Verdict, the Caſe in Fact muſt be found clear to a common Intent, without Equivocation. *Vaughan*'s Rep. 78.

If

If the Jury collect the Contents of a Deed, and also find the Deed *in hæc verba*, the Court is not to judge upon their Collection, but upon the Deed itself. The Jury may find the Contents of a Deed or Will proved by Witnesses. *Ibid.* Contents of a Deed.

Trespass for disturbing him of his Common belonging to an hundred Acres, and the Jury find Common for fifty, this is for the Plaintiff; otherwise upon an *Avowry*, or *Quod permittat*, which are founded upon the Right, but the *Trespass* is for Damages. *Palmer*'s Rep. 289. Common. *Vide apres.*

If the Matter and Substance of the Issue be found it is sufficient, though it be against the *Letter* of the Issue. As in the first *Institutes*, *fol.* 114. *b.* A *Modus decimandi* was alledged by Prescription Time out of Mind, for Tithes of Lambs, and thereupon Issue joined. And the Jury found, that before twenty Years then last past, there was such a Prescription, and that for these twenty Years, he had paid Tithe-Lamb in Specie. And it was objected first, That the Issue was found against the Plaintiff, for that the Prescription was general for all the Time of the Prescription, and twenty Years fail thereof. Secondly, That the Party, by Payment of Tithes in Specie, had waved the Prescription or Custom. But it was adjudged for the Plaintiff; for albeit the *Modus decimandi* had not been paid by the Space of twenty Years, yet the Prescription being found, the Substance of the Issue is found for the Plaintiff. The Verdict may be against the Letter of the Issue, so the Substance is found. Prescription.

In an Assise of *Darrein Presentment*, if the Plaintiff alledge the Avoidance of the Church, by Privation, and the Jury find the Voidance Avoidance.

by Death, the Plaintiff ſhall have Judgment; for the *Manner* of Voidance is not the Title of the Plaintiff, but the Voidance is the *Matter*. 1 *Inſt.* 282.

Deprivation.

If a Guardian of an Hoſpital bring an Aſſiſe againſt the Ordinary, he pleadeth that in his Viſitation he deprived him as Ordinary; whereupon Iſſue is taken, and it is found that he deprived him as Patron; the Ordinary ſhall have Judgment, for the Deprivation is the Subſtance of the Matter. *Ibid.*

Breach of 20 Trees cut down for 10.

The Leſſee covenants with the Leſſor not to cut down any Trees, *&c.* and binds himſelf in a Bond of forty Pounds for the Performance of Covenants. The Leſſee cut down ten Trees, the Leſſor bringeth an Action of Debt upon the Bond, and aſſigneth a Breach, That the Leſſee cut down twenty Trees; whereupon Iſſue is joined, and the Jury find that the Leſſee cut down ten: Judgment ſhall be given for the Plaintiff, for ſufficient Matter of Iſſue is found for the Plaintiff to forfeit the Bond. *Ibid.*

Indictment of Murder, and Verdict finds Manſlaughter. Sid. 325.

And this Rule holds in Criminal Cauſes: For if *A.* be appealed or indicted of Murder, *viz.* that he of Malice prepenſed killed *J. A.* and pleads that he is Not guilty *modo & forma*, yet the Jury may find the Defendant Guilty of Manſlaughter without Malice prepenſed, becauſe the Killing of *J. A.* is the Matter, and Malice prepenſed is but a Circumſtance. *Plo. Com.* 101. 1 *Inſt.* 282.

Modo & forma.

And generally where *modo & forma* are not of the *Subſtance* of the Iſſue, but Words of *Form*, there it ſufficeth, though the Verdict doth not find the preciſe Iſſue.

As

As if a Man bring a Writ of Entry *in casu provisо*, of the Alienation made by the Tenant in Dower to his Disinheritance, and counteth of the Alienation made in Fee; and the Tenant saith, That he did not alien in manner as the Demandant hath declared; and upon this they are at Issue, and it is found by Verdict, that the Tenant alienated in Tail, or for Term of another Man's Life. The Demandant shall recover, yet the Alienation was not in Manner as the Demandant hath declared. *Littleton*, *Sect.* 483. Alienation.

Also if there be Lord and Tenant, and the Tenant hold of the Lord by Fealty only, and the Lord distrain the Tenant for Rent, and the Tenant bringeth a Writ of Trespass against his Lord, for his Cattle so taken, and the Lord plead that the Tenant holds of him by Fealty and certain Rent, and for that Rent behind he came to distrain, *&c.* and demands Judgment of the Writ brought against him, *Quare vi & armis*, *&c.* And the other saith, That he doth not hold of him in Manner as he supposed; and upon this they are at Issue. And it is found by Verdict, that he holdeth of him by Fealty only; in this Case the Writ shall abate, and yet he doth not hold of him, in Manner as the Lord hath said; for the Matter of the Issue is, Whether the Tenant holdeth of him or no; for if he holdeth of him, although that the Lord distrain the Tenant for other Services which he ought not to have, yet such Writ of Trespass, *Quare vi & armis*, *&c.* doth not lie against the Lord, but shall abate. *Littleton*, *Sect.* 484. Trespass by the Tenant against the Lord.

The Verdict may find the Defendant guilty of the Trespass at another Day or Place.

Also in a Writ of Trespass for Battery, or for Goods carried away, if the Defendant plead Not guilty in Manner as the Plaintiff supposeth, and it is found that the Defendant is guilty in another Town, or at another Day, than the Plaintiff supposes, yet he shall recover. *Ibid. Sect.* 485.

Conspiracy.

So the Jury may find the Conspiracy at another Day, for the Day is but Form.

Battery.

In Battery, if the Defendant justify at another Day with a Traverse, *Devant & apres*, he may be found guilty at another Day.

Son assault demesn.

If the Defendant by his Plea agree with the Plaintiff in the Day, Year and Place, and the Plaintiff reply *de son tort demesn sans tiel cause*, and the Defendant prove an Assault by the Plaintiff, the Plaintiff shall not give in Evidence a Battery at another Day. *Roll.* Tit. *Trial* 687. *Vide devant, cap.* 11.

And so in many other Cases these Words, *scil. In Manner as the Demandant or the Plaintiff supposed*, do not make any Matter of Substance of the Issue. *Littleton, Sect.* 485.

Modo & forma when Words of Form, *Siderfin* 357.

And 'tis a Rule, That where the Issue taken goeth to the Point of the Writ or Action, there *modo & forma* are but Words of Form, as in the Cases aforesaid. *Ibid.*

When of Substance, and must be found by the Verdict.

But when a collateral Point in Pleading is traversed, as if a Feoffment be alledged by two, and this is traversed *modo & forma*, and 'tis found the Feoffment of one, there *modo & forma* is material; so if a Feoffment be pleaded by Deed, and it is traversed *Absque hoc, quod feoffavit modo & forma*, upon this collateral Is-

So in *non Assumpsit modo & forma*, upon an *Indebitatus Assumpsit*, there *modo & forma* were not material. *Secus* when the Action is upon a Collateral Promise.

sue,

ſue, *modo & forma* are ſo eſſential, as the Jury cannot find a Feoffment without Deed. *Co. Littleton* 282.

But here is a Diverſity to be obſerv'd, That albeit the Iſſue be upon a collateral Point, yet if by the finding of Part of the Iſſue, it ſhall appear to the Court, that no ſuch Action lieth for the Plaintiff, no more than if the whole had been found, there *modo & forma* are but Words of Form, as in the aforeſaid Caſe of the Lord and Tenant, in *Littleton*, *Sect.* 484. it plainly appears; for it was all one, whether the Tenant held by Fealty only, or by Fealty and Rent, becauſe if either was true, the Tenant could have no Treſpaſs, *Quare vi & armis*, againſt the Lord in that Caſe, by the Statute of *Marlbridge*, *cap.* 3. 1 *Inſt.* 281. *b.*

Treſpaſs *Quare vi & armis* lies not againſt the Lord for diſtraining his Tenant, without Cauſe.

After the Verdict recorded, the Jury cannot vary from it, but before it is recorded they may vary from the firſt Offer of their Verdict. And that Verdict which is recorded ſhall ſtand. 1 *Inſt.* 227. *Plo. Com.* 212.

Jury cannot vary from their Verdict when it is recorded.

There is alſo a Verdict given in open Court, and a privy Verdict given out of Court, before any of the Judges of the Court; ſo called, becauſe it ought to be kept ſecret and privy from each of the Parties, before it be affirmed in Court. *Plowd.* 211.

Open Verdict and privy Verdict.

Becauſe the Jury may vary from their private Verdict; as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this ſhall ſtand, and the private Verdict ſhall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court, ſhall be adjudged their Verdict. *Plowd.* 211. *b.*

The Jury may vary from a private Verdict.

And although it is usual to take the Verdict secretly, when the Jurors are agreed, yet this is not of the Necessity of Law, but of the Curtesy of the Law, for the Ease of the Jurors; and in this Case, their Saying shall not be their Verdict till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff shall be demanded, and then may be nonsuited: But when they give their Verdict secretly, the Plaintiff is not demandable, nor can be then nonsuited; but he may be nonsuited, when the Verdict of Right ought to be rendred; *ergo* the Force is in the giving of the Verdict in the Court, and not elsewhere. *Plowd.* 211. *b.*

Bro. *Tit.* Verdict, 12.

And also in the Court itself, if they pronounce their Verdict, they may change it, if they be mistaken, or if it be not full in Law, or for some other reasonable Cause immediately perceived; therefore if they may vary and contradict their first Verdict given in open Court; *a fortiori* upon better Advisement they may do so, when their first Verdict was given out of Court, and they not discharged; for they be in the Custody of the Bailiff, till they be discharged in Court. *Plo. Com.* 211. *Moor* 33.

Jury shall give but one Verdict in the same Cause.

The Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same Issue (unless it be in Case of Assize, when the Party is to recover by View of the Jurors.) But there must be a *Venire facias de novo*. *Cro.* 2 Part 210.

Verdict good in Part.

If a Verdict be good in Part, and naught in another Part, it shall stand in Part, and a new Inquest shall be for the rest. *Bro.* Tit. *Verdict*, 89.

For

For the Jury's Direction in their Verdict, greater Liberty is permitted in pleading a Matter doubtful in Law; for a Traverſe (for this Reaſon) may be omitted: As in Debt againſt an Executor, it is a good Plea to ſay, Adminiſtration was committed to him, and therefore he ſhould be named Adminiſtrator, and not Executor, without traverſing that he is not Executor; for the Lay-People know no Difference between one adminiſtring as Executor, and one adminiſtring as Adminiſtrator. 9 *E.* 4. 33.

What permitted in Pleading for the Jury's Direction in their Verdict.

For this Reaſon likewiſe the Special Matter may be pleaded together with the General Iſſue, *&c.* As that the Obligation put in Suit was ſealed by him and delivered to *A.* to keep till certain Indentures were made between the Plaintiff and him, before which Indentures made, the Plaintiff took the Obligation out of the Poſſeſſion of *A.* ſo is not his Deed. This is good, and yet by this general Concluſion, the Matter precedent ſhall not be waved, for it were perilous to put the Special Matter in the Mouth of Lay-People. 9 *H.* 6. 38.

A ſpecial *Non eſt factum.*

* So likewiſe in Treſpaſs, if a Releaſe be pleaded in a foreign County, and tried there for the Plaintiff, there alſo ſhall Damages be aſſeſſed by the ſame Jury. For where the Principal is tried, there alſo ſhall the Acceſſary and Incidents be inquired of. I need uſe no other Inſtances to illuſtrate this, than the Caſe aboveſaid. *Roll. Trial*, 687. *L. pl.* 1.

* Where the Iſſue upon a collateral Matter is tried in a foreign County, Hundred, *&c.* where the Principal, there the Acceſſary ſhall be tried. 21 *Aſſ.* 14.

They may find a Condition to defeat a Freehold of Land, although it be not pleaded; but of Things in Grant, they muſt alſo find

What Things the Jury muſt find.

the Deed of the Condition. *Ibid.* 690. *P. pl.* 1.

Modo & forma. Upon a Traverſe of a Leaſe *Modo & forma*, the Jury may find a Leaſe of another Date, although the Date be miſtaken in the Pleading, but not a Leaſe made by another, than from whom it was pleaded; for this is out of the Iſſue in Matter and Form. *Ibid. pl.* 6. *Hob.* 272.

Rent. In an Aſſize of Rent, the Jury may find that the Rent was granted with an Attornment, although no Specialty be ſhewed. *Ibid.* 691. *pl.* 8.

Matter of Record. A Fine or Recovery may be found by the Jury without ſhewing of it under Seal. The Jury cannot find againſt what is admitted by the Record. *Siderfin* 271. *Roll. Trial*, 691. *Q. pl.* 3.

Record. If the Verdict be contrary to a Matter of Record, it may be ſet aſide as nought.

Inſpection. If a Party be found by Inſpection to be within Age, the Verdict that finds him of Age ſhall be holden for none.

Jeofail. A Verdict finding Matter againſt the Record is a Jeofail. 11 *H.* 6. 42.

Divorce. They may find a Divorce, which is a Record in the Spiritual Court, but not by our Law. *Roll. Trial*, 691. *Q. pl.* 4.

Attainder. The Verdict found an Attainder of Felony not pleaded, nor given in Evidence *ſub pede ſigilli*, 26 *Aſſ.* 2. and the Court took it ill.

So if a Fine and Recovery were found, not pleaded, nor given in Evidence *ſub pede ſigilli*, 26 *Aſſ.* 5. *Ibid. pl.* 2, 3.

The Jury is not to inquire of that which is agreed by the Parties. *Ibid. R. pl.* 1.

Dower. As in Dower, if the Tenant ſays he has been always ready to render Dower, and the Iſſue be

if

if the Husband died seised, the Jury is not to inquire if the Estate was dowable, for this is confessed. *Ibid. pl.* 2.

If the Defendant doth not deny the Waste, but pleads another Matter, *scilicet*, *nul tiel vill lou*, *&c.* The Jury is not to inquiry of the Waste, but give Damages although no Waste be made. *Ibid. pl.* 3. Waste.

In Debt upon a Bond, with a Condition to perform an Award, and the Defendant plead *nullum fecit Arbitrium*, and the Plaintiff reply, *fecit Arbitrium*, and sets it forth, and the Defendant rejoin *Nul tiel Award*, the Jury cannot find any Matter *Dehors* to make the Award void in Law, which doth not appear within the Award pleaded; as that the Release awarded would discharge the Bond of the Submission; for nothing is in Issue, but whether such an Award was made *in fait*, as is alledged; neither could this Matter be alledged by any Rejoinder; for it would have been a Departure from the Plea, and a Jury cannot find that which would have been a Departure, because out of their Issue. But in this Case, if the Defendant would have took Advantage of it, he ought to have pleaded all this Matter in his Bar, and not have said *nullum fecit Arbitrium*; for 'tis a Departure in the Rejoinder, to acknowledge an Award which was denied in the Plea. *Ibid.* 692. *pl.* 10. Award.

In Debt for twenty Shillings, and the Issue be *solvit ad diem*, and the Verdict be *quod debet* the twenty Shillings, this is not good, because it is not direct but by Argument. *Ibid.* 693. *pl.* 4. How the Jury ought to find their Verdict, and what shall be intended.

In Debt upon an Obligation, if the Defendant say, That he is a Lay-Man, not lettered

Nient lettered. and 'twas read as an Acquittance, *& iſſint nient ſon fait*, if the Jury find he knew what he did, and that it was a Bond, and he was willing to be bound, this is no good Verdict, becauſe they ought preciſely to find if it was his Deed or not. *Ibid. pl.* 4.

If the Iſſue be, whether where a Copyhold is granted to three for the Lives of two, if he Cuſtom. which died ſeiſed, *&c.* ought by Cuſtom to pay an Heriot or not, and the Jury find that there was never any ſuch Eſtate granted in the Manor, this is not good for the Reaſons aforeſaid. *Roll. Trial*, 693. *S. pl.* 1.

So if the iſſue be, if by Cuſtom an Eſtate Tail may be granted, and the Jury find that it may be granted in Fee, which is greater, yet 'tis not good. *Ibid. pl.* 3.

Treſpaſs. In Treſpaſs for taking and cutting his Leather, if the Defendant juſtify as a Searcher; and cut it for the better Search *More Scrutatorum*, without any other Damage; and the Plaintiff reply, *De injuria ſua propria, abſque hoc*, that he cut it *More Scrutatorum*, upon which Traverſe Iſſue is joined, and the Jury find that the Defendant cut it as the Plaintiff has alledged; this is no good Verdict, becauſe 'tis not any Anſwer to the Iſſue but by Argument. *Ibid.* 694. *pl.* 4.

Battery. In Treſpaſs and Battery in *A.* to find Not guilty in *A.* is not good; for it ought to be generally Not guilty. *Ibid. V. pl.* 1.

In Debt on Bond againſt an Heir who pleads *Riens per Diſcent*, upon this Plea, if the Plaintiff reply, That he hath divers Lands in *D. per Deſcent*, and the Jury find he had divers Lands by *Deſcent*, this is good, without finding what; for 'tis not material, in regard upon this falſe Plea

Plea a general Judgment is to be given without having respect to the Assets. *Ibid. pl.* 4.

In an *Ejectione firmæ* of five Acres, if they find the Defendant guilty in eight Pieces *de terra parcel' tenementorum prædict'*, 'tis a void Verdict because uncertain, and no Execution can be made of Pieces. *Ibid. pl.* 5.

In Ejectment of a Manor, on *Non culp.* the Verdict was for the Plaintiff for the Manor, and *Quoad servitia Non culp.* 'Twas objected, That the Verdict was not for the Plaintiff for the Manor, because as to the Services 'twas for the Defendant; but 'twas answered the last Part as to the Services was void and Surplusage. *Siderfin* 232. *Keb.* 1 Part 810. Ejectment. Manor.

In Case upon *Non Assumpsit* pleaded, if the Jury find that the Defendant *Non assumpsit*; yet if two Witnesses say true, then we find that he did assume. The first shall stand for the Defendant, and the last Words are void; and Surplusage shall not vitiate. *Roll. Trial*, 695. *pl.* 2. *Dyer* 372. Verdict special. Surplusage.

If in an Ejectment upon a Lease of twenty Acres, and the Jury find *quod dimisit* ten Acres *tantum*, and the Conclusion of the Verdict is, *Et si super totam materiam Curiæ videbitur quod Defendens dimisit* twenty Acres, then they find for the Plaintiff; and if not, then for the Defendant; this is repugnant, and so the Verdict is void in all. *Ibid. pl.* 4. Ejectment.

In Ejectione firmæ de 7 *Messuagiis sive Tenementis*, and Verdict *pro Querente*. 'Tis ill for the Incertainty, and the Verdict doth not help it; and *Hale* refused to let the Jury find for the Plaintiff, for the Messuages, and *Non Culp.* for the Tenements. But by *Twisden*, if it had been *de uno Messuagio sive Tenemento, vocato*

cato the *Black Swan*, it had been good, becauſe the laſt Part makes it certain. *Siderfin* 295. *Keb.* 2 Part 80. *Cro.* 3 Part 186.

Certain. To aſſeſs Damages incertainly, is void; as to ſay we aſſeſs forty Pounds, if we muſt by Law; if not, then but three Pounds, this is void. *Roll. Trial*, 695. *pl.* 6.

Damages. *Indebitatus aſſumpſit*, to aſſeſs Damages *occaſione debiti prædicti*, is good, although it ought to be *occaſione non performationis*, *&c.* *Ibid.* 696. *pl.* 8.

Information. In an Information upon the Statute 39 *Eliz. cap.* 11. for dying with Logwood, by which he loſt twenty Pounds for every Offence; upon Not guilty, if the Jury find him guilty for uſing this againſt the Statute for forty Days, by which he loſt this is not good, becauſe he forfeits twenty Pounds for every Time, and the Number of Times do not appear. *Ibid. pl.* 7.

If the Jury find the Words in the Will, and yet do not find the Will, the Verdict is not good. *Ibid.* 695. *pl.* 1.

If they firſt find the Special Matter, and then find the Iſſue generally, the Special Matter is hereby waved. *Ibid.* 696. *X. pl.* 1.

Where a ſpecial Verdict ſhall be good by Intendment. If the Jury find that *J. S.* was ſeiſed in Fee, and deviſed the Land to *J. D.* although they do not find that the Land was held in Socage, yet this is good, for this ſhall be intended, this being a collateral Thing, and this being the moſt common Tenure. *Ibid.* 697. *pl.* 4.

Devaſtavit. Verdict of Eloinment and Converſion to his own Uſes proves a *Devaſtavit*. *Keb.* 2 Part 488.

Will. Roll. Trial, 697. *pl.* 5. If they find that he was ſeiſed and made his Will *in hæc verba*, *&c.* although they do not find

find that he devised the Land as in the former; yet this is good by Intendment.

But if a Thing is left out, and cannot be intended, the Verdict is not good.

If the Issue be, whether the Sheriff took *J. S.* and kept him in Prison in Execution for certain Debt and Damages by Force of a *Capias ad satisfaciendum*, and the Jury find that he took him by Force of an *Alias Capias ad satisfaciendum*, *&c.* although they do not find that he kept him in Execution for the Debt and Damages aforesaid, according to the Issue; yet this is a good Special Verdict; for it shall be intended; for the consequence is necessary from this which is found, for he could not take him, but that he must be in Execution; *Vide* several Instances of this, *Roll.* Tit. *Trial*, 697. *Y. pl.* 2.

If the Jury find that *J. S.* was seised in Fee, and made his Will *in hæc verba*, and that he afterwards died; although they do not find that he died seised, yet it shall be intended that he died seised, and so good. *Ibid. pl.* 6. Will.

If they find that *A.* did bargain and sell, *&c.* although they do not find any Consideration, yet this shall be intended. *Ibid.* 699. *pl.* 6. Bargain and Sale.

So if they find that such Persons *Authorizati virtute literarum patentium Dominæ Elizabethæ*, *&c.* and do not find that the Letters Patent were under the Great Seal, yet this shall be intended. *Ibid. pl.* 9. Letters Patent.

Verdicts of Laymen shall be taken according to their Intent, and need not so precise a Form as in Pleadings. *Lib.* 4 65. *Hob.* 76. *Sid.* 27, 75. *Lit. Rep.* 133, *&c.* Intent.

Therefore

Therefore if the Jury find a Recognizance in Nature of a Statute Staple in this Manner, That the Conusor came before *R. O.* Recorder of *London*, and *T. O.* Mayor of the Staple, *& recognovit se debere* to *B.* for 200 *l.* and do not say, *secundum formam Statuti*, *&c.* nor *per Scriptum Obligatorium*, *&c.* although the Statute of 23 *H.* 8. provide, That it shall be by Bill Obligatory, sealed with three Seals; and here it does not appear that there was any Bond or Seal, nor that it was according to the Statute; yet these Things shall be intended, they having found a Recognizance before the Mayor and Recorder. *Roll. Trial*, 700. *pl.* 14.

Notes.

A Special Verdict may be amended by the Notes. *Keb.* 1 Part 907. see a Coroner's Inquisition amended by his Notes.

Where a Special Conclusion of a Special Verdict shall aid the Imperfections of it.

If the Jury find a special Verdict, and refer the Law upon that special Matter to the Court, although they do not find any Title for the Defendant, which is a collateral Thing to the Point which they refer to the Court, yet the Verdict is good enough, for all other Things shall be intended, except this which is referred to the Court. *Lib.* 5. 97. *Lit. Rep.* 135, *&c. Keb.* 2 Part 362, 412.

In Ejectment, if the Plaintiff declare upon a Lease made by *A.* and the Jury find a Special Verdict and Matter in Law upon a Power of Revocation of Uses by an Indenture, and Limitation of new Uses, and then a Lease for Years made to the Plaintiff by the Lessor in the Declaration, and another in which there is an apparent Variance; but they conclude the Verdict, and refer to the Court, whether the Grant of a new Estate found in the Verdict be a Revocation

vocation of the firſt Indenture, or not: The Special Concluſion ſhall aid the Verdict, ſo that the Court cannot take Notice of the Variance between the Leaſe in the Declaration and Verdict, becauſe the Doubt touching the Revocation, is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the firſt Indenture, and not of the former Uſes, and Limitation of new Uſes, as it ought to be; yet in a Verdict this is good, for their Intention appears. *Roll. Trial*, 701. *pl.* 1.

So *Note* a Difference between a *ſpecial* Concluſion and Reference to the Court, and a *general* Concluſion and Reference to the the Court; *vide hic Poſtea.*

For whom the Verdict ſhall be ſaid to be found. Roll. Trial, 702. *C. pl.* 1.

In Debt for forty Shillings for a Horſe ſold, and the Jury find forty Shillings Debt for two Horſes ſold; this is found againſt the Plaintiff, for this is not the ſame Contract.

So in Debt, for twenty Pounds, if the Jury find forty Pounds Debt, this is againſt the Plaintiff. *Ibid. pl.* 3.

In Debt for twenty Pounds for Wood ſold, and the Jury find the Bargain was for twenty Marks; the Plaintiff ſhall not have Judgment for this Variance. *Ibid. pl.* 5.

So in Debt for Rent upon a Demiſe of two Acres, and the Jury find it upon the Demiſe of one Acre, the Plaintiff ſhall not have Judgment. *Ibid. pl.* 6.

But in Debt for twenty-four Pounds eight Shillings, received for the Plaintiff's Uſe, if the Jury find the Defendant owes twenty-four Pounds, but not the eight Shillings, the Plaintiff ſhall have Judgment; for perhaps he had paid the eight Shillings. *Ibid. pl.* 7.

In an Action upon the Case against *A.* if the Plaintiff declares, That by Custom, *&c.* amongst Merchants, *&c.* if two are found in Arrearages upon Account, and they assume to pay this at certain Days, that any one of them may be charged for the whole by himself, and then shews the Account of *A.* and *B.* who are found in Arrear in so much, *&c.* And promised to pay this at certain Days, but paid it not; and now he brings his Action against *A.* although upon *Non Assumpsit* pleaded, it be found that the Days of Payment are mistaken, yet the Days being past the Action lies, because the Law makes the Promise upon the Account, and the Days are no Part of the Consideration. *Ibid. pl.* 8.

In Debt upon a Lease of twenty Acres, the Defendant pleaded the Lease was of twenty-four Acres, *sans ceo que il demise les* 20 *Acres tantum.* The Verdict found the Demise of twenty-one Acres only; 'twas looked upon as a *Jeofail*, and found for neither Plaintiff nor Defendant. *Dyer* 32.

If the Issue be Assets in *Sale*, and the Verdict be Assets in *Dale*, 'tis a good Verdict, for the Place is not material. *Keb.* 1 Part 662.

So of an Account before *A.* and *B.* an Account before *A. tantum* is good.

In Escape of Baron and Feme, and the Jury find of the Baron only, 'tis good, and so in other Actions grounded upon a *Tort* to find Part. But upon a Contract, the Verdict ought to pursue the Declaration, otherwise in Debt upon a Lease for Years, for Rent. *Sid.* 5, 6. *Keb.* 1 Part 371.

Issue whether Money was paid for *Blackacre.* Verdict, that it was paid for *Blackacre* and *Whitacre*,

Whitacre, good: So *per Twisden*, whether a Common was from *Lady-day* to *Michaelmas*, and the Verdict find from *Christmas* to *Michaelmas-day*, 'tis good. *Keb.* 1 Part 192.

Indictment of forcible Entry and Detainer, a Verdict of peaceable Entry and forcible Detainer, is sufficient to grant Restitution upon. *Keb.* 1 Part 419.

Barwel prayed a Bill of forcible Entry and Detainer; found *Ignoramus* as to the Detainer, and *Billa Vera* as to the Entry; might be quashed; which was done; for the Offence as charged being intire, the Grand Jury cannot apportion their Verdict as the Petit Jury on Indictment may. *Keb.* 1 Part 931.

Where all is to be given in Damages, the Jury are Chancellors, and may give so much as the Case requires in Equity. Damages.

In Detinue of a Bond of 100 *l.* if the Jury find that he received a Bond of a greater or less Sum, the Verdict is for the Defendant. Detinue. Roll. Trial, 703. pl. 11.

So in a Promise to do two Things, if the Jury find but one of them, 'tis for the Defendant. *Ibid. pl.* 12. Promise.

Otherwise in Ejectment upon a Demise of ten Acres, if the Jury find a Demise of less, the Plaintiff shall have Judgment. *Ibid. pl.* 13. Ejectment.

If the Issue be upon a Prescription for Common belonging to a Messuage, and two hundred Acres of Land, fifty of Meadow, and fifty of Pasture; if the Jury find Common belonging to the House, twenty Acres of Meadow, and twenty of Pasture in two of the Vills, and not in the rest, the Prescription is not found. *Ibid. pl.* 14. *Hob.* 209. Prescription, *Vid. devant.*

If Part of the Trespass, or Wrong, be found, it is sufficient in Trespass, or an Action of the Trespass.

Case. Case upon a *Tort*; as by a Commoner, for putting and depasturing Cattle in the Common. *Ibid.* 704. *pl.* 16, 17. 9 *Coke* 112.

Ancient Querent. If the Issue be, whether all the Lands in Execution were the Estate of the Father in Tail, or in Fee, and Part is found in Tail, and Part in Fee; Judgment shall be given for the Defendant, who pleaded the Seisin in Fee. *Ibid. pl.* 18.

Ejectment. If the Plaintiff in Ejectment declares upon a Demise made the first of *May*, to commence at *Michaelmas* next, if the Jury find a Lease made at any other Day before the Feast, it is found for the Plaintiff; for the Day of making is not material. *Ibid. pl.* 19.

Otherwise of a Lease of Years in Possession; as of a Lease made the 5th of *May*, *Habend.* for three Years from *Lady-day* before; and the Jury find a Lease made the 15th Day of *May*, for three Years from the same *Lady-day*; for this is a Lease in Possession. *Ibid. pl.* 21.

Imprisonment. In false Imprisonment in *Middlesex*, and the Defendant justifies in *London*, to which the Plaintiff saith, the Defendant took him in *Middlesex de son Tort demesn*; and Issue upon this, and the Jury find the Defendant took him in *Middlesex* lawfully, upon a Writ, yet this is for the Plaintiff; for the Issue is upon the Place, and not upon the *Tort*, for that is confessed by the Pleading, if the Taking was in *Middlesex*. *Ibid.* 705. *pl.* 31.

Debt. In Debt for twenty Pounds, and the Jury find forty Pounds, the Plaintiff shall not have Judgment; the Reason seems to be, because it cannot be the same Debt, which is intire; but upon another Contract which is mis-laid. *Ibid.* 706. *pl.* 32.

If

If the Issue be Payment after Execution, and the Jury find Payment before, yet the issue is proved; for Payment before is Payment after. *Ibid. pl.* 34. *Audita Querela.*

In Debt upon a Bond, bearing Date the 25th of *June*, upon *Non est factum*, if the Jury find it his Deed, but that it was delivered eight Days after the Date, this is found for the Plaintiff. *Ibid. pl.* 35. Obligation.

If the Issue be, that two made the Feoffment, or two were Church-wardens, *&c.* and the Jury find but one, *&c.* the Issue is not found. *Ibid. pl.* 36, 37. Joint and several.

If the Breach of Covenant or Waste be assigned in cutting twenty Trees, and the Jury find but ten, yet the Plaintiff shall have Judgment. *Ibid. pl.* 40. Obligation. Covenant. Waste.

If in *Replevin*, *&c.* the Jury find that Part of the Cattle were Levant and Couchant, and Part not, and the Issue is upon all, the Issue is not found. *Ibid. pl.* 41. *Totum & pars.*

In Debt, *tam quam*, on the Statute 1 *Jac. cap.* 22. for cutting Oaks unseasonably; on Not guilty, and Verdict for the Plaintiff, it was excepted in Arrest of Judgment, That the Jury found the Value of each Tree, six Shillings eight Pence, but do not cast up the Sum. *Sed per Curiam*, In this Issue it is needless; but had the Issue been *Nil debet*, they must cast it up, and not leave it to the Court. *Keb.* 1 Part 835.

Kelynge excepted to an Indictment of Assault, Battery and Wounding. The Jury find him only guilty *de transgres. & insult. præd. Sed per Cur'*, 'Tis well enough, and comprehends the whole; *contra* if it had been *de insult. præd'* only. And the Presentment, Traverse and Indictment.

Trial was all at the ſame Day and Seſſions, *ex aſſenſu*, being a Favour to the Party. *Keb.* 1 Part 879.

Ejectment. Void in Part.

In Ejectment of fourteen Acres, the Defendant pleaded Not guilty, the Jury find him Guilty of twenty, the Plaintiff ſhall have Judgment for the fourteen, and the Verdict is void for the Reſidue. *Roll. Trial*, 707. *pl.* 42.

Information. Uſury.

In an Information upon an Uſurious Contract by two, it is not ſufficient to find a Contract by one. Otherwiſe where the *Tort* and Offence is ſeveral, as againſt two upon the Statute 4 *E.* 6. *Pro emptione butiri*, and ſelling it by Retail, *&c.* and ſo in an Action upon the Caſe in Nature of Conſpiracy, and for Words laid twice in one Declaration. This will put in Iſſue the Manner as well as the Matter where the Manner is Material, as the Time of the Fact and other Circumſtances. *Ibid. pl.* 49, 50.

Modo & forma.

Replevin. Leaſe.

In Replevin the Defendant avows as a Commoner; the Plaintiff replies, that *W.* made a Leaſe to him 30 *Martii*, *Habend.* from *Lady-day* laſt, and Iſſue *Modo & forma*; and the Jury find a Leaſe made 25 *Martii*, *Habendum extunc* for a Year; this is good, although the Time of making and Commencement of the Leaſe is miſtaken, in as much as *extunc* includes the Feaſt. Yet becauſe a ſufficient Title and Leaſe is found for the Plaintiff to put in his Cattle, this is ſufficient; this being the Subſtance, and the *Modo & forma* ſhall not put the Circumſtances in Iſſue. *Roll. Trial*, 707. *pl.* 44, 54.

Ibid. 708. *pl.* 55.

So in Treſpaſs, if the Defendant juſtify the putting in his Cattle for Common, which he claims from *Pentecoſt*, to a certain Time every Year, which is traverſed *Modo & forma*, and the

the Jury find that he had Common *in vigilia Pentecoſtes in feſto*, this is found for the Defendant.

But otherwiſe in theſe Caſes, in an Aſſize of Common, becauſe there he ought to recover his Title. *Ibid. pl.* 56.

In Debt for Rent, if the Defendant plead an Entry by the plaintiff, before the Rent was due, *ſcilicet* ſuch a Day, which was after, and Iſſue upon the Entry *Modo & forma*, and the Jury find for the Defendant, he ſhall have Judgment; for the *Scilicet* is void, and the *Modo & forma* go to the Matter. See after. *Ibid.* 709. *pl.* 59.

In Debt upon a Bond, and the Defendant plead *Non eſt factum*, and the Jury find the Bond made jointly by another with the Defendant, the Plaintiff ſhall have Judgment; for the Defendant ſhould have pleaded this. *Ibid. pl.* 60. 5 *Coke* 119. *Non eſt factum.*

If a Deviſe be pleaded abſolute, if the Jury find a Deviſe upon a Condition precedent, it is not good. *Ibid. pl.* 61. Deviſe.

In Debt againſt *A.* as Daughter and Heir to *B.* and the Defendant plead *Riens per Diſcent*, of *B.* and the Jury find that *B.* was ſeiſed in Fee, and died, having Iſſue the Defendant his Daughter, and his Wife with Child of a Boy, who was afterwards born alive, and died one Hour after; this Iſſue is found againſt the Plaintiff, becauſe the Defendant had the Land as Heir to her Brother, who was laſt ſeiſed, and not to the Father, and ſo the Defendant had not the Land by Diſcent from the Father, but from the Brother; yet this is Aſſets in her Hands, if it had been ſpecially pleaded. *Ibid. pl.* 62. *Riens per Diſcent.*

Error. In a Writ of Error brought by him in Remainder in Tail to reverſe a Fine, if the Defendant plead in Bar of the writ of Error, a Common Recovery by the Tenant in Tail; to which the Plaintiff replies, That at the Time of the Recovery ſuffered, he himſelf was Tenant to the *Præcipe*, and ſo the Recovery void, upon which Iſſue is joined, and the Jury find that he was Tenant of Part, but not of other Part. This Iſſue is partly found for the Plaintiff, and partly for the Defendant, ſo the Court ſhall proceed to the Examination of the Error, for that whereof he is found no Tenant; but it is a good Bar of the Writ of Error, for that whereof he is found Tenant to the *Præcipe*. *Ibid.* 711. *pl.* 4.

Part.

Promiſe. In *Aſſumpſit* to pay Money upon Requeſt, and Iſſue upon this, if the Jury find the Plaintiff promiſed to pay the Money, but do not ſay upon Requeſt, nor *Modo & forma*, it is not found for the Plaintiff. *Ibid. pl.* 5.

If the Subſtance of the Iſſue be found it is ſufficient. Manor. In Ejectment of a Manor, if the Jury find that there were no Freeholders, and ſo it is no Manor in Law, yet being a Manor by Reputation, and ſo the Tenements paſs by the Leaſe; therefore this Verdict is found for him who pleads the Leaſe of the Manor, for the Subſtance is, Whether any Thing was demiſed or not? *Ibid.* 712. *pl.* 1.

Gaol. In an Information of Extortion againſt the Gaoler of the Gaol, or Priſon of the Caſtle of *Maidſtone*; the Jury found there was no Caſtle, but that there was a Gaol; this was for the Plaintiff, becauſe Gaol is the Subſtance. *Ibid.* 711. *pl.* 6.

Account. If the Iſſue be, Whether the Defendant had accounted before *R.* and *W.* Auditors aſſigned

signed by the Plaintiff, and the Jury find an Account before *R.* only, the Issue is found for the Defendant; for the Account is the Effect of the Issue. *Vide Roll.* Tit. *Trial*, 707. *pl.* 46.

If Eleven agree, and the Twelfth will not, the Verdict of the Eleven cannot be taken, but the Court may carry the Jurors with them in Carts until they are agreed. 41 *Ass.* 11. Jury agree. *Ibid.* 712. *pl.* 9.

A privy Verdict may be altered in open Court. *Ibid. pl.* 1. Verdict altered.

In an *Extendi fac.* upon a Statute, if the Jury deliver their Verdict in Writing, they may afterwards make it more formal, but they cannot alter it in Substance, for it is a compleat Verdict by the Delivery. So of Presentments, *&c. Ibid. pl.* 2.

A Fine pleaded in Bar, and that after the Death of *A. scil.* 1 *August* 3 *Car. B.* Father of the Plaintiff was alive, *& in plena vita, & remansit infra hoc regnum infra quatuor Maria, &c. apud* W. *in Com.* D. and no Entry or Claim within five Years after; and the Plaintiff replies, and takes Issue, *Que il non fuit & remansit infra hoc regnum Angliæ modo et forma, &c.* And the Jury find *Quod non fuit & remansit infra hoc Regnum Angliæ* 1 *August* 3 *Car.* but that he was there 1 *Maii* 4 *Car.* and remained there a Month, and refer to the Court, *An fuit & remansit infra hoc Regnum modo & forma, &c.* This Issue is found for the Defendant, for the Matter and Substance of the Plea is, whether he was within the Realm after the Death of *A.* and five Years before Entry or Claim *per* him or the Plaintiff, and *modo & forma* shall not make Fine and Non claim. *Modo & forma.*

the Day material. *Roll.* Tit. *Trial*, 713. *F. pl.* 1.

Judgment, arreſted, at what Time.

Judgment upon a Demurrer, and a Writ of Inquiry executed at the Return; the Party may ſhew any Thing in Arreſt of Judgment; for Judgment is not compleat until the laſt Judgment. The firſt is but an Award: A Man may plead any Thing in Arreſt of Judgment after Verdict, which will make Error if the Judgment be given. *Roll. Trial*, 716. *H.* 1. *I.* 1.

In Debt upon a ſimple Contract againſt an Executor, if he will not plead in Abatement, but other Matter which is found againſt him, he ſhall not afterwards alledge that he is not chargeable in Arreſt of Judgment. *Ibid. pl.* 2.

So in Debt againſt Executors upon Arrearages of Account, where they are not chargeable. *Ibid. pl.* 3.

What may be alledged.

That which appears ill upon the ſame Record, may be alledged in Arreſt of Judgment; but not a Matter of Fact, which doth not appear upon the Record, becauſe the Parties cannot try the Iſſue. As that a Juror was challenged, and yet ſerved on the *Tales*, for this cannot appear without alledging Matter of Fact. Nor that the Defendant's Attorney had no Warrant. But if there be any irregular or foul Practice, this may be offered to ſet aſide a Judgment. *Ibid. K. pl.* 1, 2, 3, 4.

Viſne.

In Error upon Judgment in *Durham*, in Debt upon Bond to pay twenty Pounds; the Defendant pleaded *ſolvit ad diem*, not ſaying where; a Verdict thereupon is void, becauſe there is no *Viſne*, and ſo no Trial. *Keb.* 2 Part 620.

If

If any Thing be omitted in the Declaration, or if more is put in the Declaration than is found by the Jury, if it makes a material Variance betwixt the Nar and the Verdict, the Action ſhall abate. Variance between the Verdict and the Declaration.

Theſe following are adjudged material Variances. *Roll. Trial*, 717, 718.

If the Declaration be for theſe Words, *Thou procuredſt eight or ten of thy Neighbours to perjure themſelves*, and the Jury find that he ſaid, *Thou haſt cauſed eight or Ten, &c.* for it might be a remote cauſe, *ſcilicet* without Procurement. Nar. *He is a Bankrupt.* Ver. *He will be a Bankrupt within two Days.* Nar. *He is a Thief.* Ver. *He ſtole a Horſe.* Nar. *Thou art a Murderer.* Ver. *He is, &c.* Nar. *I know him to be a Thief.* Ver. *I think him to be a Thief.* Words.

So it is material Variance, if a ſpecial Promiſe be laid to be upon Requeſt, and the Verdict find it without Requeſt. So if the Declaration be upon a Leaſe made by two, or by Baron and Feme, and the Jury find that one of them had nothing in the Land, or that the Baron only made the Leaſe, or that the two were Tenants in Common, and ſo ſeveral Leaſes; otherwiſe if they were Copartners. Promiſe. *Ibid.* 719. *pl.* 17, 22, 23, 24, 25, 26.

So in Caſe, that the Teſtator was indebted to the Plaintiff in fifty-five Pounds, and the Defendant being Adminiſtrator *in conſideratione, &c.* promiſed to pay this; upon *Non Aſſumpſit*, if the Verdict find the Promiſe to be to pay thirty Pounds, Part of the fifty-five Pounds. *Ibid. pl.* 27.

So in Ejectment, if the Nar. be of a Leaſe of three Acres, a Leaſe of a Moiety will not maintain the Nar. *Ibid.* 720. *pl.* 29. Ejectment.

So

Waſte. So in Waſte, for cutting Trees, and the Verdict find that he eradicated the Trees, but did not cut them. *Ibid. pl.* 28.

Preſcription. A Preſcription *in modo decimandi*, That every one who hath ſeven Lambs, or under ſeven, ſhall pay to the Parſon *ob.* for every Lamb, and the Jury find that; and farther, That if he had more than ſeven Lambs, he ſhould pay a Lamb; and that the Parſon ſhould pay the Pariſhioner *ob.* This is not the ſame Preſcription, but makes a Variance. *Ibid. pl.* 30.

Variance. But if there be a Variance between the Verdict and the Nar. either by Way of Surplus or Defect; yet if this Matter of Variance be not material in the Extenuation of the Action or Damages, the Action ſhall lie notwithſtanding the Variance. *Ibid.* 717. *pl.* 5.

Theſe enſuing are adjudged not to be material.

Nar. *Strong Thief.* Verdict *Thief.* Nar. *I ſay, &c.* Ver. *I affirm, or I doubt not.* Nar. *The Plaintiff will do ſuch a Thing.* Ver. *I think in my Conſcience he will, &c.* Nar. Of a Leaſe by a Parſon for five Years; if he *tam diu* ſhould be Parſon, *& tam diu viveret.* And the Ver. find the Leaſe to be for five Years, if he *tam diu viveret*, without the Words, *and ſhall continue Parſon*; for the Law implieth, that if he be deprived or reſign, that the Leaſe determines. Nar. *He is a Murderer.* Ver. *He was a Murderer*; for when he ſays, *He is a Murderer*, it is not intended, that he did the Act *in præſenti*, but before. So in Treſpaſſes or Actions upon *Torts* and Wrongs which are ſeveral, if the Verdict find Part, it is no material

rial Variance; and the Plaintiff in theſe Caſes ſhall have Judgment. *Roll.* Tit. *Trial*, 717. *pl.* 6, 7, 10, 12, 20, 21.

Inqueſt by Default.

A Jury of *Middleſex* was demanded in the *Common Pleas*, the firſt Day of the Term, and ſome appeared, and ſome not, ſo that there was not a full Jury, and neither the Defendant nor his Attorney did appear; and therefore the Plaintiff prayed that the Inqueſt might be awarded by Default; and by the Opinion of *Welſh* and *Dyer*, his Prayer ſhall be granted, and the *Cuſtos Brevium*, and all the Prothonotaries ſaid the Courſe was ſo, for the Parties are demandable before the Jury; and if the Plaintiff make Default, he ſhall be nonſuited; and if the Defendant make Default, the Jury ſhall be awarded by Default, whether they appear or not. *Dyer* 265.

What the Defendant loſes by his Default.

Where an Inqueſt is taken by Default, the Defendant ſhall loſe his Challenges, and by 28 *Aſſ. p.* 42. Tit. *Enqueſt* in *Fitz.* he ſhall loſe his Evidences alſo. *Bro. Enqueſt* 10. *quod non eſt lex.*

When the Defendant may be condemned by Default, and when an Inqueſt muſt be taken upon the Default.

Det. The Defendant pleaded a Releaſe, and the Plaintiff replied *Non eſt factum*, and at the Day of the *Venire facias* the Defendant made Default, and the Inqueſt was taken upon his Default, and found for the Defendant, for which the Plaintiff took nothing by his Bill; and yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his Default before the taking of the Verdict. *Et ſic vide folly in le Plaintiff*, *Bro. Ibid.* 5. But upon ſuch Releaſe and Default in Treſpaſs, the Inqueſt ſhall be taken by Default, and the Defendant ſhall not be condemned by Default, though the Plaintiff

Plaintiff pray it; and the Reaſon is, becauſe the Debt is certain, and the Damages are incertain in Treſpaſs. *Bro. Ibid.* 3.

And *Finch*, *fol.* 409. hath well collected out of *Brook*, That always in an Action of Treſpaſs, whatſoever the iſſue be, Releaſe, Juſtification, *&c.* and alſo in Debt, Detinue, Account, and the reſt which are for Things in Certainty, if the Iſſue be taken upon a Matter in *fait* only, as Payment, or that an Acquittance pleaded in Bar by the Defendant was made by *Dures*, *&c.* The Inqueſt ſhall be taken by Default, if the Defendant makes Default; but in the laſt recited Actions of Debt, *&c.* if the Iſſue be upon the Acquittance itſelf, Releaſe, or other Matter in Writing, the Plaintiff may pray Judgment upon the Defendant's Default, if he will; but if he do not pray it, the Jury ſhall be taken by Default, as in an Action of Treſpaſs.

Verdict without or againſt Teſtimony.

The Jury may give a Verdict without Teſtimony, or againſt Teſtimony, when they themſelves have Conuſance of the Fact. *Plo. Com.* 86.

The Jury are to find Coſts and Damages in Debt, Treſpaſs, Ejectment, Nuſance, Covenant, *&c.* in Debt for Tithes, treble Value of the Tithes, and no Coſts nor Damages.

In *Audita Querela ſur Statute*, the Iſſue and Value of the Land.

In Waſte, Treble Damages.

In *Quare Impedit.* 1. Whether the Church was void by the Death of the Incumbent?

2. Whether it be now full, or not? If it be full, at whoſe Preſentation? And if ſix Months be

be past since the last Avoidance? And of what Value it is by the Year? And what Costs and Damages?

The Verdict. In Dower, *Inquiratur si vir obierit seizitus de Tenementis prædict. in dominico suo ut de feodo, aut de feodo talliat. Et si ita invenerint, tunc quantum tenementa illa valent per annum in omnibus exitibus ultra reprisas, juxta verum valorem eorund. & quantum tempus dilabitur a tempore mortis præd. viri, & quæ dampna petens sustinet tam occasione detentionis dotis quam præmissorum.*

En Dower, Nota, The Jury finding the Dying seised, they must assess Costs and Damages; but if they find the Husband was seised, but did not die so, then no Costs nor Damages, but only the Value of the Land.

In Detinue. *Si pro quer. de valore rei detent. & custag. & dampna.*

In *Replevin,* Damages for both Parties, and Costs.

In Account, no Damages nor Costs.

In placito terræ. Nulla dampna nec custag. Warrantia Chartæ Consimile.

Assise Consimile.

Prohibition. *Si pro quer. tunc inquir. de exitibus & non plus.*

Partitione facienda. Si pro quer. tunc de exitibus & non plus.

En brief de Entry en le Per. Custag. & dampna.

In all real Actions, generally no more than the Issue.

In *Replevin,* if the Plaintiff be called, and do not appear, the Court takes the Verdict for the Defendant, and the Jury assess Damages and Costs. But *Nota,* That a Verdict is

not usually taken in other Actions after the Plaintiff is nonsuit. *Sid.* 2 Part 155.

Assident damna, well in a Verdicts.

Redwood versus *Coward*, *Hill.* 8 *W.* 3. *B. R. Intr. Trin.* 8 *W.* 3. *Rot.* 645. A Verdict was entred *assident damna* for *assidunt*, and on a Writ of Error, this was assigned for Error, and insisted was future. *Sed non allocatur*; for it may be the present Tense of the Word *Assideo*; however, in Verdicts the same exactness of Expression is not required as in Pleading, for they are the Words of a Lay Jury, and though it may not be proper *Latin*, yet it is so common that it is now made good by Prescription. *Vide Plo.* 347. 3 *Cro.* 647. 4 *Co.* 7. And the Court said, it was not like *Concessum* instead of *Consideratum est* in a Judgment, for that these Words were of different Import, and the Law requires that Judicial Acts should appear to be done upon Consideration. *Salk.* 328.

Copyhold Estate laid without saying *ad voluntatem domini*, and held well after Verdict, because the Lands alledged to be Parcel of the Manor.

Crouther versus *Oldfield*, *Hill.* 4 *Ann. B. R.* The Plaintiff declared 'Quod cum seisitus fuisset de uno Messuagio & decem acris terræ in N. parcell. Manerii de W. ac tent. per copiam rotulor. Cur. Manerii illius ut tenens custumarius in feodo simplici secund. consuetudinem Manerii; cumque ipse præfat. quer. habeat & habere debeat, ipseque & omnes tenentes custumarii Manerii praedict. per consuetud. infra Manerium ill. a tempore cujus, &c. habuer. & habere debuerunt & consueverunt communiam Pasturæ in quodam loco vocat. Waimles Moor parcell. dicti Manerii pro omnibus averiis communicalibus super tenementa sua custumaria levan. & cuban. tanquam ad tenementa sua prædict spectan. & pertinen. prædict. tamen defendens,' to deprive him of his said Com-

mon,

mon, had inclosed, *per quod*, *&c.* Upon Not guilty pleaded, the Plaintiff had a Verdict; but upon Motion in the *Common Pleas*, Judgment was arrested. Upon this the Plaintiff brought a Writ of Error in *B. R.* and that Judgment was reversed: 1st, It was agreed in this Case, that a Man cannot be a Copyholder, nor an Estate be a Copyhold Estate, tho' it be held *per Copiam Rotulorum & secundum consuetudinem Manerii*, unless it be also *ad voluntatem Domini*; and the Chief Justice said, the great Difference between Copyholds and customary Freeholds which pass by Surrender is, that the Copyholder is in by Demise from the Lord; but in the Case of customary Freeholds, the Lord is only an Instrument; and that in pleading a Title to a Copyhold Estate, it is sufficient to shew a Grant from the Lord; but in the other Case it is not enough to shew, that the Lord granted it, or that *A.* surrendered to the Lord, and he granted, but it must be shewn that the Surrenderor was seised in Fee and surrendered to the Lord, and he granted, *&c.* 2dly, It was agreed, That if this Estate must be taken to be Freehold, the Judgment of the *Common Pleas* was rightly given: For then the Plaintiff being seised of a Freehold Estate, to make a Title to the Common, should have prescribed, that he and all those whose Estate he had, have Time out of Mind had, *&c.* and cannot make a Title by Custom, according to 1 *Cro.* 418. And here the Court admitted the Case of *Dorne* and *Cashford*, and said, That though the Plaintiff in Possessory Actions may declare upon his Possession without setting out a Title; yet if he undertakes to set out a Title, and shews a bad one, the Verdict

In pleading Copyhold it is sufficient to shew the Grant of the Lord; in customary Freeholds the Estate of the Surrenderor must be shewn.

Verdict will not aid a bad Title when shewn, tho' it need not have been shewn.

Verdict cannot cure that. *Vide* 1 *Cro.* 418. 2 *Cro.* 315. 2 *Saund.* 136, 186. 1 *Mod.* 294. But the Court held, That now after Verdict, this Eſtate of the Plaintiff muſt be taken to be a Copyhold Eſtate, and not a Freehold Eſtate, becauſe it is both laid and found, that the Tenements were Parcel of the Manor, and that by Cuſtom, the Plaintiff *ut tenens cuſtumar.* has Common; all which is utterly impoſſible, unleſs the Tenement was Copyhold, and therefore muſt be ſuppoſed ſuch, though the Words *ad voluntatem Domini* were omitted, comparing it to the Caſe of Debt for Rent by an Aſſignee of a Reverſion, who ſhews no Attornment, and has a Verdict, and the Caſe in 1 *Sid.* 218. Upon this Foot the whole Court held, That though a Title, which could not be good, could never be aided by a Verdict; yet a Title in a Declaration which was only imperfectly ſet forth, and where the Want of ſomewhat omitted might be ſupplied by Intendment, was cured by Verdict: And hereupon, ſuppoſing this to be a Copyhold Eſtate, there aroſe theſe Objections: 1ſt, That the Cuſtom was not alledged expreſly, *quod infra manerium prædict. talis habetur & a tempore, &c.* but *quod cum ipſe per conſuetudinem habere debeat*, which does not affirm a Cuſtom, but ſuppoſe it. *Vide* 4 *Co.* 31. *b. Vaug.* 251, 253. 2 *Cro.* 185. *Co. Ent.* 123. *b. Reſt.* 627. 2dly, That they ought not to claim Common *tanquam ad tenementa ſua ſpectan. & pertinent.* for it is annexed to the Eſtate and not to the Land; the Reaſon is becauſe the Eſtate grew by Cuſtom, and ſo did the Common as Part thereof, or rather a Privilege annexed thereto. *Vide* 2 *Cro.* 253. 2 *Brownl. Entr.* 96. If a Copyholder

Verdict aids a Title defectively ſet forth, not a bad one.

Copyholder purchase the Freehold of his Copyhold, his Common is gone. As to the first Objection the Court held, that it was but a defective Title, and there was Room enough to induce a Proof of the Custom; and it was only an Informality of laying the Custom, which is cured by the Verdict. As to the second Objection the Chief Justice took this Difference, *viz.* Where a Copyholder claims Common in the Wastes of a Manor, it properly and strictly belongs to his Estate; and if he enfranchise his Copyhold, in that Case his Common is lost; but where he claims it out of the Manor, it belongs to the Land, and not to the Estate; and if he enfranchise the Estate, the Common continues: But all the Precedents of Common are, *tanquam ad tenementa sua spectan'*. 9 *Co.* 113. *Co. Ent.* 9. *Dyer* 363. *b.* 1 *Saund.* 349. 2 *Saund.* 321. *Co. Ent.* 574. *Winch Ent.* 931, 1026, 1027, 1111. *Hern.* 81. *Brown'. Red.* 428, 430. And the Chief Justice thought, that since the Pleadings were so, the Common might be said to belong to the Copyhold Tenement, since it belonged to the Copyhold Estate; for that which belongs to the Estate belongs to the Tenement, and the Judgment was reversed after great Deliberation. *V.* 1 *Lut.* 126. the Report of the Judgment of the *Common Pleas*. *Salk.* 364.

Diversity between Common belonging to the Estate, and to the Land.

Upon a Writ of Enquiry, either on Demurrer or Judgment by Default, executed the last Day of a Term, the Plaintiff may enter Judgment the 5th Day after, and not before: So where there is a Verdict, there must be four Days betwen the Verdict and the Judgment; not that in all Cases there can be a Motion in Arrest, as in the principal Case, where the Verdict or Inquest is the last Day of the Term; but still there may be a Writ of Error, and this

There must be four Days between the Verdict and the Judgment; and between the executing a Writ of Enquiry and entring the Judgment.

Time is allowed for these Purposes; and therefore, after Verdict or Writ of Enquiry, the Course is for the Plaintiff to give a Rule to enable him to enter his Judgment *Nisi causa ostensa sit in contrarium infra quatuor dies*; and in the Principal Case, Execution was set aside, because it was sued out the 4th Day after the Term, the Writ of Enquiry being executed and returned the last Day. *Clerk* v. *Rowland*, *T.* 5 *W. & M. B. R. Salkeld* 399.

Want of Averment aided by Verdict.

Trespass, the Defendant justified by reason of Common in the Place where, for Cattle Levant and Couchant, and did not aver that the Beasts were Levant and Couchant; but this was held to be aided by the Verdict. *Anon. T.* 21 *Car.* 2. *B. R.* 1 *Vent.* 34.

Intendment.

After Verdict the Court shall admit any Intendment to make the Case good. *Per* Ch. J. in the Case of *Pollexfen* and *Ashford* v. *Crispin*, 23 *C.* 2. in *B. R.* and *Twisden* cited a Case which was in Trespass; *Quare Phasianos suos cepit*, and the Plaintiff had Judgment after Verdict; for it shall be intended they were dead Pheasants. 1 *Ventris* 123.

Privy Verdict in an Information, but not in Case of Treason or Felony.

The King versus *Ledgingham*, *Mich.* 22 *Car.* 2. *B. R.* In an Information against him for the King, the Court took a privy Verdict, and so as was said was the usual Course at the Assizes, but it cannot be so in Cases of Felony or Treason, as is said in 1 *Inst.* 227. *b.* In Cases of Life and Member, if the Jury cannot agree before the Judges depart, they are to be carried in Carts after them; so that they may give their Verdict out of the County. 1 *Ventris* 97.

Verdict may be given out of the County.

Verdict amended by Notes.

The King versus *Kent*, *Hill.* 8 & 9 *W.* 3. *B. R.* A Verdict General or Special may be amended by the Notes of the Clerk of Assize; but this is in Civil, not in Criminal Cases. *Vide* 1 *Ro. Rep.* 82. *Salkeld* 47.

Bishop

Bishop of *Worcester*'s Case, *Mich.* 8 *W.* 3. *B. R.* Ejectment against seven Defendants, who enter into the common Rule for confessing Lease, Entry and Ouster, and plead to Issue: The Plea-roll was right, so was the *Venire*, *Distringas*, and the *Jurata*; but the Issue in the *Nisi prius* Roll was between the Plaintiff and five Defendants only, which was tried, and Verdict *pro Quer.* and an Amendment being moved for, it was opposed, because it was to alter the Verdict, to subject the Jury to an Attaint, to make another Issue, and to make two Defendants guilty who were not tried: But it was amended; for nothing could be inquired of but the Title of the Lessor, and the Issue depended on his Title, which is not altered by this Amendment. And it must be considered that all seven entred into the common Rule, and that the Plea-roll, *&c.* are all Right; and this cannot be intended other than the same Issue, and the Amendment is only to rectify a plain Mistake, and make that the Issue which was apparently intended to be so. *Salkeld* 48.

Ejectment *versus* 7 Defendants, and all join in the common Rule, and the Issue was right in the Plea-roll, *&c.* but the *Nisi prius* Roll was *versus* 5 only; and after Verdict *pro Quer.* this was amended by adding the other two Defendants.

Child versus *Harvey*, *Mich.* 11 *W.* 3. *B. R.* A *Scire facias* on a Recognizance; upon Issue *Non solvit* it was found for the Plaintiff: Mr. *Northey* moved to set aside the Verdict, because in the *Distringas* and *Jurata* the Return was *a die Sanctæ Trin. in tres Sept. nisi Johannes Holt, Mil.* 27 *die Junii prius venerit*, the twenty-seventh Day of *June* being the Morrow after *tres Trin.* But the Plea-roll was right, for the Award there was *tres Mich.* It was agreed on all sides, that the Trial must be set aside unless the Mistake could be amended, because it appeared the Judge had no Authority to try the Issue; and the Court held it could not be amended. The Court agreed, That

In the *Distringas* the Day of *Nisi prius* was appointed after the Day in Bank, and after Verdict held not amendable by the Plea roll, because the Judges Authority was confined to that Day.

Where the *Nisi prius* Roll may be amended by the Plea roll, and where not.

where the *Distringas* or *Jurata* are right, and the Amendment does not alter the Point in Issue, the *Nisi prius* Roll may be amended by the Plea-roll. So it was in the Bishop of *Worcester*'s Case, and there the *Distringas* and *Jurata* were right. 2 *Cro.* 353. *Dyer* 260. *Hut.* 81. 1 *Cro.* 596. But here neither *Distringas* nor *Jurata* are right. The Day appointed for the *Nisi prius* is impossible; and the Judge's Authority is confined to the Day. And where a Judge's Authority is confined to a Day, his Trial at another Day must be without Authority. *Salkeld* 48, 49.

Insufficient Return of *Devastavit* aided by the Verdict.

Brook versus *Ellis*, *Pas.* 5 *W. & M. B. R.* Upon a *Devastavit* suggested against both Executors, *viz. A.* and *B.* the Writ was to the Sheriff to inquire of a Waisting by both; the Sheriff returned a *Devastavit* as to *A.* but said nothing as to *B.* This being assigned for Error, after Judgment upon a Verdict, was held to be aided by the Verdict, being but an insufficient Return or Misreturn, by reason of the Omission; otherwise if no Return at all. *V.* 3 *Cro.* 587. 3 *Co.* 81. *Noy* 72. *Cro. Car.* 295, 312. *Salkeld* 363.

Court must judge according to the Verdict.

When a Verdict is found there can be nothing added to it, or taken from it; but as it is found, so the Court must judge of it, and whatever is found in a Verdict, whereupon the Court can give any Judgment, must be positively found, not ambiguously; for if the Jury doubt, the Court can never resolve the Matter of Fact: And *Shower* held, That if the Jury do find positively the Matter of Argument, and do not make the Conclusion *de facto*, the Court shall reject the Matter of Argument, and give Judgment to the contrary: And for this cited *Cro. Car.* 549. *Crisp* and *Pratt*'s Case, where Issue being joined upon a Fraud, it was

adjudged there, That though there be never ſo many Circumſtances of a Fraud found, unleſs the Jury find it to be a Fraud, the Court ſhall adjudge it to be none. *Shower* 539.

What Matter of Record may be taken Advantage of in Arreſt of Judgment, and what not.

Peachy verſus *Harriſon*, *Trin.* 9 *W.* 3. *C. B.* It is not a good Exception in Arreſt of Judgment, that there is no Warrant of Attorney filed, tho' that be Matter of Record, and may be aſſigned for Error. The Reaſon is, becauſe tho' it be a Matter of Record, yet it is not of that Record before the Court, but of another. *Salk.* 77.

If the *Diſtringas* be returnable within Term, and there happen not to be four Days between the Trial and the End of the Term, yet Judgment ſhall be entered that Term.

Anonymus, *Paſ.* 11 *W.* 3. *B. R.* Indictment in *B. R.* for a Miſdemeanor, was tried three Days before the End of the Term, and Judgment was entered the ſame Term; ſo that the Defendant had not four Days to move in Arreſt of Judgment. And the Queſtion was, Whether this Entry of the Judgment was regular, and whether it ſhould not have been ſtayed till the Term following? *Et per Holt*, C. J. If there be four Days and more between the Trial and the End of the Term, Judgment ought not to be entered within the four Days; but if the *Diſtringas* be returnable within the Term, and the Party is tried within two or three Days before the End of the Term, the Judgment ſhall be entered that Term, tho' there be not four Days to move in Arreſt of Judgment; ſo it was ſettled in the Caſe of *Knox* and *Levarr*, upon a Conference between *Scrogs* C. J. and Sir *William Jones* Attorney General, contrary to the Report of Sir *Samuel Aſtrey*.

Two Ways of taking Advantage in Arreſt of Judgment.

'Arreſt of Judgment is either for Matter 'intrinſick, that is, ſuch as appears by the 'Record itſelf, which will render the Judgment 'erroneous, and reverſible; or extrinſick, *i. e.* 'ſome foreign Matter ſuggeſted to the Court, 'which proves the Writ is abated, for it is

'not

'not enough that it proves the Writ is only a-'bateable: The old Courſe of taking Advan-'tage in Arreſt of Judgment was thus: The 'Party after a general Verdict, having a Day 'in Court, (for ſo he has as to Matters of 'Law, tho' not of Fact) did aſſign his Excep-'tions in Arreſt of Judgment by Way of Plea; 'and it was called Pleading in Arreſt of Judg-'ment. This differed from moving in Ar-'reſt of Judgment, which was done by one as '*Amicus Curiæ*, where the Party was out of 'Court. *Vide Co. Entr.* 295. *b.* the Manner of 'doing it'. *Vide* 2 *Ro.* 716. 9 *E.* 11. *a.* 4 *H.* 7. 9. 5 *H.* 7. 23. *Raſt.* 107. *Salkeld.* 77, 78.

The Courſe of moving in Arreſt of Judgment.

It is againſt the antient Courſe of the Court to make a Rule to ſtay Judgment, unleſs the *Poſtea* be brought in; but the Court, if there be probable Cauſe ſhewn, will order the *Poſtea* to be brought in. *Et per Cur'*, If one moves in Arreſt of Judgment, he ought to give Notice to the Clerk in Court of the other Side; but the better Way is to give a Rule upon the *Poſtea* for bringing it into Court, for that is a Notice of itſelf. *Wood* verſus *Shephard*, *T.* 2 *Ann. B. R. Salkeld* 78.

Where a Divorce ſhall be intended after Verdict.

Deerly verſus the Dutcheſs of *Mazarine*, *Hill.* 8 *W.* 3. *B. R. Aſſumpſit* for Wages and Money lent; on *Non Aſſumpſit*, the Defendant proved ſhe was married, and her Huſband alive in *France:* The Jury found for the Plaintiff; upon which, as a Verdict againſt Evidence, ſhe moved for a new Trial; but it was denied; for it ſhall be intended ſhe was divorced. *Salk.* 116.

Want of Averment aided by the Verdict.

Indorſee declared on a Bill of Exchange againſt the Drawer; and the Bill was, *Pray pay this my firſt Bill of Exchange, my ſecond and third not being paid*; and the Indorſement was ſet out in this Manner, that the Drawee *indorſavit*

dorsavit super billam illam, content. billæ illius solvend. to the Plaintiff, without shewing that it was subscribed. On *Non Assumpsit*, and Verdict *pro Quer.* It was objected in Arrest of Judgment, that there was no Averment, that the second and third Bill was not paid, which is a Condition precedent: *Sed non allocatur. Et per Cur'*, That must be intended, for the Plaintiff could not otherwise have had a Verdict: And for the same Reason also, the Indorsement, which was likewise excepted against as set forth in the Declaration, was held good, being aided by the Verdict; the Court comparing it to an Action of Debt by an Assignee of a Reversion, without shewing an Attornment, which on *Non debet* is aided by Verdict; for if the Indorsement be necessary to transfer the Bill, so is the Attornment to pass the Reversion. *Ergo*, as the Attornment shall be supplied by the Jury's finding *Debet*, so shall the Indorsement by their finding *Assumpsit. East* v. *Essington*, *M.* 1. *Ann. B. R. Salkeld* 130.

Want of Averment, that the Money was demanded of the Drawer, no Cause for arresting Judgment.

Action on a promissory Note against the second Indorsor, and the Plaintiff declared without any Averment, that the Money was demanded of the Drawer, or the first Indorsor. And this was held good upon Motion in Arrest of Judgment; for the Indorsor charges himself in the same Manner as if he had originally drawn the Bill. *Harry* versus *Petit*, *T.* 9 *Ann. B. R. Salkeld* 133.

Certiorari not to be served after the Jury sworn.

The Defendant was indicted before Justices of the Peace, and pleaded Not guilty; and after the Jury were gone out to consider of their Verdict, he deliver'd in a *Certiorari*; and the Justices return'd the Verdict; and it was held well; for it cannot be delivered after the Jury is sworn. *Rex* versus *North*, *H.* 8 *W.* 3. *B. R.*

B. R. Salkeld 144. See 1 *Sid.* 317. 2 *Keb.* 138. 141, *&c.* 6 *Mod.* 17, 61, 62. 1 *Sid.* 296. 1 *Mod.* 41.

Discontinuance by Leave of the Court may be after special Verdict, not after general.

Price versus *Parker*, *Paſ.* 8 *W.* 3. *B. R.* Upon a Motion to diſcontinue upon Payment of Coſts, the Court held, That after a general Verdict there can be no Leave given to diſcontinue; but that after a Special Verdict there may, becauſe that is not compleat and final; but in that Caſe it is a great Favour. The ſame Point was ſo ruled, *inter Reeve* and *Gelding*, *Paſ.* 5 *&* 6 *W. & M. B. R. Salkeld* 178. See 1 *Lev* 48, 227, 298. 2 *Lev.* 118, 124. 1 *Sid.* 60, 84, 306. 1 *Mod.* 13, 41. 2 *Danv.* 156. 1 *Saund.* 23, 339. 2 *Saund.* 73. *Far.* 5.

Two Counts in Nar. for Things of the ſame Kind, not averred to be different: Helped by the Verdict.

Weſt verſus *Troles*, *Mic.* 9 *W.* 3. *B. R.* The Plaintiff declared, That whereas the Defendant 6 *Maii* 1695, for 120 Weeks Diet then paſt, had promiſed to pay him 7 *s. per* Week, and that the Plaintiff *poſtea*, *ſcil.* 6 *Maii* 1695, having found the Defendant Diet 120 Weeks then paſt, the Defendant promiſed to pay the Worth, and that it was worth 7 *s. per* Week: Upon *Non Aſſumpſit* and Verdict *pro quer.* it was now moved in Arreſt of Judgment, that the Weeks in the *Quantum meruit* are not ſaid to be *aliæ* than thoſe laid in the ſpecial Promiſe, ſo that the Defendant is twice charged for the ſame Thing. *Sed non allocatur*; for they do not appear neceſſarily to be the ſame, and without Neceſſity the Court will not intend them ſo. *Salkeld* 213. See *Far.* 149.

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